9

No. 84-438-CSX
Status: GRANTED

Title: Superintendent, Massachusetts Correctional Institution, Walpole, Petitioner
v.
Gerald Hill and Joseph Crawford

Docketed:
September 17, 1984

Court: Supreme Judicial Court of Massachusetts

Counsel for petitioner: Smith,Barbara A. H.

Counsel for respondent: Sabino,Jamie Ann

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1984	G	Petition for writ of certiorari filed.
2	Oct 23 1984		Brief of respondents Gerald Hill, et al. in opposition filed.
3	Oct 23 1984	G	Motion of respondents for leave to proceed in forma pauperis filed.
4	Oct 24 1984		DISTRIBUTED. November 9, 1984
5	Nov 13 1984		Motion of respondents for leave to proceed in forma pauperis GRANTED.
6	Nov 13 1984		Petition GRANTED.
			**********
7	Nov 24 1984	G	Motion of respondents for appointment of counsel filed.
8	Dec 3 1984		DISTRIBUTED. December 7, 1984. (Above motion).
9	Dec 10 1984		Motion for appointment of counsel GRANTED and it is ordered that Jamie Ann Sabino, Esq., of Wellesley, Massachusetts, is appointed to serve as counsel for the respondents in this case.
10	Dec 29 1984		Joint appendix filed.
11	Dec 29 1984		Brief of petitioner Supt., MA Corr. Inst. filed.
12	Dec 31 1984		Brief amicus curiae of United States filed.
13	Jan 8 1985		Brief amicus curiae of California, et al. filed.
14	Jan 16 1985		Record filed.
15	Jan 16 1985		Record filed.
16	Feb 8 1985		Brief of respondents Gerald Hill, et al. filed.
17	Feb 5 1985		SET FOR ARGUMENT. Monday, March 25, 1985. (2nd case).
18	Feb 21 1985		CIRCULATED.
19	Mar 18 1985	X	Reply brief of petitioner Supt., MA Correctional Institution filed.
20	Mar 19 1985		Lodging received from counsel for petitioner.
21	Mar 25 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-438

Office-Supreme Court, U
FILED
SEP 17 1984
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division

Martin E. Levin
Assistant Attorney General
One Ashburton Place
Boston, M. 02108
(617) 727-2240

59pp

QUESTIONS PRESENTED

I. Whether prison inmates have a substantive due process right to judicial review of prison disciplinary board findings?

II. Whether, under the due process clause, the findings of a prison disciplinary board should be reviewed under a standard more stringent than review for action which is arbitrary, capricious, or an abuse of discretion?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISION INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....7

ARGUMENT.....14

A Prison Inmate Has No General Due Process Right To Judicial Review Of Disciplinary Board Findings For Sufficiency Of The Evidence, And The Creation Of Such A Right Is Not Consistent With Those Principles Enunciated By This Court In The Context Of Prison Administration...14

CONCLUSION.....24

TABLE OF AUTHORITIES

CASES

Bell v. Wolfish,
441 U.S. 520 (1979).....23

Chavis v. Rowe,
643 F.2d 1281 (7th Cir.),
cert. denied sub nom.
Boles v. Chavis,
454 U.S. 907 (1981).....8,12

Edwards v. White,
501 F.Supp. 8 (M.D.Pa. 1979),
aff'd, 633 F.2d 209 and 633 F.2d 212
(3rd Cir. 1980).....9,12

Flythe v. Davis,
407 F.Supp. 127 (E.D.Va. 1976).....10

Gerald Hill v. Superintendent,
Massachusetts Correctional Institution,
Walpole (and a companion case),
392 Mass. 198, ___ N.E.2d ___
(Mass. 1984).....1

Goldberg v. Kelly,
397 U.S. 254 (1970).....10,17,18

Goss v. Lopez,
419 U.S. 565 (1975).....22

BEST AVAILABLE COPY

Griffin v. Illinois,
351 U.S. 12 (1956).....14

Hewitt v. Helms,
____ U.S. ____,
103 S.Ct. 864 (1983).....24

Hiatt v. Brown,
339 U.S. 103 (1950).....14

Inglese v. Warden,
687 F.2d 362 (11th Cir. 1982)....8,12

Jackson v. Carlson,
707 F.2d 943 (7th Cir. 1983).....20

Jones v. North Carolina Prisoners' Union,
433 U.S. 119 (1977).....23

McQueen v. Vincent,
53 A.D.2d 630, N.Y.S.2d 475
(App. Div. 1976).....11

Morrissey v. Brewer,
408 U.S. 471 (1972).....10,16

Ortwein v. Schwab,
410 U.S. 656 (1973).....14,15,18

Parham v. J.R.,
442 U.S. 584 (1979).....22

Pollard v. Baskerville,
481 F.Supp. 1157 (E.D.Va. 1979),
aff'd., 620 F.2d 294
(4th Cir. 1980).....9

Procunier v. Martinez,
416 U.S. 396 (1974).....23

Russell v. Division of Corrections,
Comm. of Virginia,
392 F.Supp. 476 (W.D.Va), aff'd,
530 F.2d 969 (4th Cir. 1975).....9

Smith v. Rabalais,
659 F.2d 539 (5th Cir. 1981),
cert. denied,
455 U.S. 992 (1982).....8,12,20

Whelchel v. McDonald,
340 U.S. 122.....15

Wilwording v. Swenson,
502 F.2d 844 (8th Cir. 1974),
cert. denied,
420 U.S. 412 (1975).....8,12

Wolff v. McDonnell,
418 U.S. 539 (1974).....8,16,22

Woodard v. Mills,
511 F.2d 1399 (4th Cir. 1975).....10

Statute

28 U.S.C. §1257(3).....2

BEST AVAILABLE COPY

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, Gerald Hill v. Superintendent, Massachusetts Correctional Institution, Walpole (and a companion case), is reported at 392 Mass. 196, ___ N.E.2d ___ (Mass. 1984). (App. A).

The trial judge's Memorandum And Order is unreported. Joseph Crawford and Gerald Hill v. Joseph Ponte, Civil No. 136746 and 136747 (Norfolk, SS. January 25, 1983). (App. B).

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was issued June 19, 1984, affirming the judgment for the plaintiffs dated January 28, 1983. The jurisdiction of this Court is claimed under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On May 2, 1982, Gerald Hill and Joseph Crawford, inmates at the Massachusetts Correctional Institution ("M.C.I."), Walpole, each received a prison disciplinary report. Hill and Crawford were each charged with 1) fighting with, assaulting or threatening another inmate, 2) use of obscene, abusive or threatening language, action, or gesture to an inmate, and 3) attempting to commit, aiding another to commit, or making plans to commit the foregoing offenses.

On May 11, 1982, Crawford and Hill each received a disciplinary hearing regarding the above charges. At Hill's hearing, the board considered the testimony and report from the reporting

officer, Sergeant Maguire. Maguire heard an inmate twice say loudly, "What's going on?" He saw some commotion close to the other side of a door that had a window through which he had been looking. Upon immediate investigation, Maguire found an inmate (Peter Stephens) bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. Maguire saw only three inmates other than the victim within the bounded area, and they were jogging away together. Two of the three jogging inmates were Hill and Crawford. Hill testified that he knew nothing about the incident. He also offered an affidavit from the assaulted inmate stating that "Gerald Hill had nothing to do with my present injuries."

At Crawford's hearing, the board heard essentially the same evidence from Sergeant Maguire. Crawford testified that he did not know what happened and that he had been checked for signs of a scuffle and nothing was found. Crawford further stated that the victim had written an affidavit stating that Crawford was innocent.

The board found that Hill and Crawford, along with the third inmate observed by Maguire, had planned, aided, or participated in the charged assault. The board combined all of the charges into one offense, and recommended sanctions of fifteen days in isolation and 100 days loss of good time for Hill and Crawford. On May 20, 1982, Joseph Ponte, Superintendent of M.C.I.,

Walpole, denied each inmate's appeal of the disciplinary board's findings.

On June 8, 1982, Hill and Crawford filed pro se complaints in Norfolk Superior Court claiming that the disciplinary board's findings had violated their federal constitutional rights because they were not supported by the evidence before the board. On December 28, 1982, the defendant, Superintendent of M.C.I., Walpole, moved for Summary Judgment. On January 28, 1983, after submission of pertinent records and affidavits, the court denied the Superintendent's Motion For Summary Judgment and granted Summary Judgment in favor of Hill and Crawford, "voiding" the findings of the disciplinary board and restoring lost good time.

On appeal, the Supreme Judicial Court held that, under the Due Process Clause of the United States Constitution, prison inmates are entitled to judicial review of the sufficiency of the evidence supporting a disciplinary board's findings. Affirming the ruling of the Superior Court, the Supreme Judicial Court held that there was insufficient evidence to permit the disciplinary board's findings.

On July 24, 1984, the court allowed the superintendent's Motion To Stay Rescript pending resolution of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The writ should be granted to resolve an important question of constitutional law which has caused

conflict among state and federal courts. The Massachusetts Supreme Judicial Court held that a prisoner's constitutional right to judicial review of disciplinary board findings is a logical extension of this Court's holding in Wolff v. McDonnell, 418 U.S. 539 (1974). The Fifth, Seventh, Eighth, and Eleventh Circuits have all subscribed to this view. See, e.g., Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Chavis v. Rowe, 643 F.2d 1281, 1287 (7th Cir.), cert. denied sub nom. Boles v. Chavis, 454 U.S. 907 (1981); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), cert. denied, 420 U.S. 412 (1975); Inglese v. Warden, 687 F.2d 362, 363 (11th Cir. 1982). The

Third Circuit has affirmed, without opinion, a federal district court decision which reviewed a prison disciplinary board's finding for sufficiency of the evidence. Edwards v. White, 501 F.Supp. 8, 11 (M.D.Pa. 1979), aff'd, 633 F.2d 209 and 633 F.2d 212 (3rd Cir. 1980).

However, the Fourth Circuit has twice affirmed, without opinions, federal district court holdings that a federal court should not review the fact findings of, or sufficiency of the evidence before, prison disciplinary boards. Russell v. Division of Corrections, Comm. of Virginia, 392 F.Supp. 476, 477 (W.D.Va), aff'd, 530 F.2d 969 (4th Cir. 1975); Pollard v. Baskerville, 481 F.Supp. 1157, 1158

(E.D.Va. 1979), aff'd., 620 F.2d 294 (4th Cir. 1980). See also Flythe v. Davis, 407 F.Supp. 127, 138 (E.D.Va. 1976) ("Federal courts will not serve as a reviewing board over the accuracy of a disciplinary committee's findings of fact."), citing the unpublished opinion in Woodard v. Mills, 511 F.2d 1399 (4th Cir. 1975).

At least two states have disagreed with the Massachusetts Supreme Judicial Court's "logical" extension of Wolff. Following a careful analysis of Wolff and its antecedents, Morrissey v. Brewer, 408 U.S. 471 (1972), and Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court of Indiana concluded that there is no constitutionally

protected right to judicial review of a prison disciplinary board's factual findings. Riner v. Raines, 409 N.E.2d 575, 577-79 (Ind. 1980). There is thus an apparent conflict between Indiana law and the federal circuit court holdings in the Seventh Circuit. And, in Robson v. Biester, 53 Pa. Commw. Ct. 587, 420 A.2d 9, 12 (Commw. Ct. 1980), the Commonwealth Court of Pennsylvania declined to engage in a review of the sufficiency of the evidence or findings of fact at a prison disciplinary proceeding. This holding apparently conflicts with the law in the Third Circuit. See also McQueen v. Vincent, 53 A.D.2d 630, 384 N.Y.S.2d 475, 476 (App. Div. 1976) (due process review of prison disciplinary proceeding does not

include a review of the merits of the fact finder's findings).

Not only has there been conflict over whether a prisoner has a constitutional right to review of disciplinary board fact-findings, but even those courts which have held that there is such review have disagreed as to the constitutionally required standard of review. The Fifth, Eighth, and Eleventh Circuits will review a prison disciplinary board's finding of fact to determine whether it is supported by "any" evidence. Smith v. Rabalais, supra; Wilwording v. Swenson, supra; Inglese v. Warden, supra. See also Edwards v. White, supra. The Seventh Circuit reviews for "substantial" evidence. Chavis v. Rowe, supra.

II. The decision of the Supreme Judicial Court expands the due process rights of prison inmates with respect to prison disciplinary proceedings beyond those which this Court has heretofore required. Indeed, in holding that an inmate has a federal constitutional right to challenge the fact-findings of a prison disciplinary board, the Massachusetts Supreme Judicial Court has essentially created a substantive due process right by which a prisoner can challenge any prison disciplinary proceeding, regardless of the fact that he has received all of the procedural safeguards to which he is constitutionally entitled.

ARGUMENT

A Prison Inmate Has No General Due Process Right To Judicial Review Of Disciplinary Board Findings For Sufficiency Of The Evidence, And The Creation Of Such A Right Is Not Consistent With Those Principles Enunciated By This Court In The Context Of Prison Administration.

It is well established that there is no general due process right to judicial review of administrative findings. Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973). Indeed, this Court has held that the Federal Constitution does not require appeals even from state criminal convictions. Griffin v. Illinois, 351 U.S. 12, (1956). Hence, this Court has refused to require judicial review in contexts in which an aggrieved party has far weightier interests at stake than do prison inmates. See Hiatt v. Brown, 339

U.S. 103, 110 (1950) (review of court-martial findings for sufficiency of the evidence is not a facet of the Court's limited review for constitutional error); Whelchel v. McDonald, 340 U.S. 122, 124 (same); Ortwein v. Schwab, 410 U.S. at 659-60 (due process does not require judicial review of a state administrative proceeding resulting in termination of welfare benefits).

Without so much as a discussion of the fact that there is no general constitutional right to judicial review of administrative findings, the Massachusetts Supreme Judicial Court held that a constitutional "entitlement" to judicial review of prison disciplinary board findings for

sufficiency of the evidence "logically follows" from this Court's holding in Wolff v. McDonnell, 418 U.S. 539 (1974). Hill v. Superintendent, 392 Mass. at 201. However, no logical precedent for such a constitutional ruling can be found in Wolff.

In Wolff, this Court balanced the state's weighty interest in maintaining strict order, and insuring swift and sure punishment for disciplinary offenses, in the sensitive prison environment, against a prison inmate's lawfully diminished liberty interests. The Court held that inmates are entitled only to minimal due process rights in connection with disciplinary action. Wolff v. McDonnell, 418 U.S. at 561-64, 571. Quoting Morrissey v. Brewer, 408

U.S. 471, 489 (1972), the Court held that such rights include "'a written statement by factfinders as to the evidence relied on and reasons' for the disciplinary action." 418 U.S. at 564. However, this Court never required any kind of lengthy formal statement of findings of fact and conclusions of law. Cf. Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (In Goldberg, relied on heavily in Morrissey, the Court held that though due process requires a statement of the decision-maker's reasons for his determination and evidence relied on at welfare termination proceedings, such statement "need not amount to a full opinion or

even formal findings of fact and conclusions of law.")[1/] Moreover, Wolff allows prison administrators the discretion to exclude from their statement of evidence those items of evidence which might implicate institutional or personal safety. 418 U.S. at 565. And, Wolff does not afford prisoners with the traditional tools for testing the strength of the evidence against them, such as the right to confrontation, cross-examination, or counsel, nor even with an unqualified

---

1/ It bears repeating that although, in Goldberg v. Kelly, supra, this Court required certain procedural safeguards prior to termination of welfare benefits, the Court has refused to hold that welfare recipients have a concomitant due process right to judicial review of the findings made at pre-termination administrative proceedings. Ortwein v. Schwab, 410 U.S. at 659-60 and n.4.

right to present countervailing evidence in their defense. 418 U.S. at 566-70. In light of the summary and flexible procedures which this Court has required in prison disciplinary proceedings, it is hardly logical to conclude that the Court ever contemplated that a disciplinary board's substantive findings should, as a matter of constitutional law, be subject to formal judicial review for "legal sufficiency of the evidence." See, Hill v. Superintendent, 392 Mass. at 202.

Considerable confusion remains as to what such formal judicial review entails. The Supreme Judicial Court reviewed the evidence in Hill to determine "whether there was some evidence which, if believed, would

rationally permit the [disciplinary] board's findings." Hill v. Superintendent, 392 Mass. at 203. The standard is ostensibly less demanding than review for "substantial evidence," which gauges the reasonableness of the fact-finder's determination based on all the evidence presented at the hearing. See Jackson v. Carlson, 707 F.2d 943, 949 (7th Cir. 1983); Hill v. Superintendent, 392 Mass. at 203, n.5. The standard applied by the Supreme Judicial Court is, however, more stringent than the "any evidence" standard, which is akin to review to determine whether administrative action is arbitrary, capricious, or an abuse of discretion. See Smith v. Rabalais, 659 F.2d at 545. The Supreme Judicial Court

took its review one step past the question whether there was "any" evidence to support the board's findings, which there clearly was, to the question whether that evidence was "legally sufficient." Hill v. Superintendent, 392 Mass. at 202 and 204. Whether "legal sufficiency" entails review of the quantum of evidence, or the nature of the evidence, or even the admissibility of the evidence, is never explained in Hill.

The inescapable effect of the Supreme Judicial Court's ruling is to expose to judicial scrutiny every single prison disciplinary action which implicates some liberty interest, regardless of the fact that, as in this case, an inmate received the full

panoply of procedural protections set forth in Wolff. The courts will therefore be exposed to a heavy burden of new litigation, and the Department of Correction will likely be forced to divert resources from the day-to-day needs of prison administration to implement more formal, trial-type disciplinary hearings. The Supreme Judicial Court paid little heed to this concern, Hill v. Superintendent, 392 Mass. at 202, despite this Court's repeated statements noting its importance in the due process calculus. See, Parham v. J.R., 442 U.S. 584 at 605-606 & n.14 (1979); Goss v. Lopez, 419 U.S. 565, 583 (1975); Wolff v. McDonnell, 418 U.S. at 569-70.

In moving beyond the procedural safeguards outlined in Wolff to substantive review of the findings of prison disciplinary boards for sufficiency of the evidence, the ruling in Hill not only expanded the constitutional rights of prison inmates, but altered their nature. This was done with little regard for this Court's repeated admonition to the judiciary not to place itself in the position of second-guessing the conclusions of prison administrators, who "have a better grasp of [their] domain than [a] reviewing judge..." Bell v. Wolfish, 441 U.S. 520, 548 (1979); See, Procunier v. Martinez, 416 U.S. 396, 404-405 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 132

(1977); Hewitt v. Helms, ____ U.S. ____, 103 S.Ct. 864, 872-73 (1983).

The ultimate outcome in Hill attests to the wisdom of that admonition.

CONCLUSION

Based on the foregoing, the writ of certiorari should issue to review the decision of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A.H. Smith

BARBARA A.H. SMITH
Counsel of Record
Assistant Attorney General
Chief, Criminal Appellate Division
(Counsel of Record)

MARTIN E. LEVIN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240

Dated: September 14, 1984

APPENDIX A

GERALD HILL v. SUPERINTENDENT,
MASSACHUSETTS
CORRECTIONAL INSTITUTION, WALPOLE
(and a companion case[1]).

Norfolk, December 5, 1983 - June 19, 1984

Present: Hennessey, C.J., Wilkins,
Liacos, Nolan, & O'Connor, JJ.

CIVIL ACTIONS commenced in the Superior Court Department on June 9, 1982.

The cases were heard by Zobel, J., on motions for summary judgment.

After review was sought in the Appeals Court, the Supreme Judicial Court ordered direct appellate review on its own initiative.

Jamie Ann Sabino for Joseph Crawford.

1/ Joseph Crawford v. Superintendent, Massachusetts Correctional Institution, Walpole.

Martin E. Levin, Assistant Attorney General, for the defendant.

O'CONNOR, J. While incarcerated at the Massachusetts Correctional Institution at Walpole (M.C.I., Walpole), the plaintiffs, Gerald Hill and Joseph Crawford, filed pro se complaints in the Superior Court claiming that the evidence presented at a prison disciplinary board hearing was constitutionally inadequate to warrant the board's determination that the plaintiffs had been involved in an assault on another inmate in violation of prison rules.[2/] In the Superior

---

2/ The complaints are entitled "writ of habeas corpus ad testificandum." The defendant does not challenge the form of the complaints. The actions should have been brought as civil actions in the nature of certiorari pursuant to G.L. c.

(footnote continued)

Court, they sought restoration of the 100 days of good time credits which the board had taken from them as punishment for their involvement in the assault, and they sought expungement from their prison records of all reference to the incident. After filing an answer in each case, the defendant superintendent of M.C.I., Walpole, moved in each case for summary judgment. A judge of the Superior Court ruled that the board's

---

(footnote continued)

249, §4. See Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 83 (1968); Cepulonis v. Commissioner of Correction, 15 Mass. App. Ct. 292 (1983).

The plaintiff's arguments are based solely on the United States Constitution. They make no claims under the Massachusetts Constitution, nor do they rely on any rules and regulations promulgated by the Department of Correction as supporting their right to judicial review of the adequacy of the evidence to warrant the disciplinary board's findings.

findings were not adequately supported by the evidence and denied the superintendent's motions for summary judgment. The judge ordered the entry of judgments for the plaintiffs vacating the board's findings, nullifying the sanctions that had been imposed, and restoring the plaintiffs' good time credits. The superintendent appealed in each case, arguing that (1) the judge erred in reviewing the board's findings for the sufficiency of the evidence because there is no constitutional right to judicial review of a disciplinary board's findings;[3/] and (2) even if such a right exists, the judge erred in

---

3/ There is no statutory right of review. Decisions of the Department of Correction are not reviewable under G.L. c. 30A, §14. See G.L. c. 30A, §§ 1, 1A.

holding that there was insufficient evidence in these cases to warrant the board's findings. After entry of the appeals in the Appeals Court, we transferred the appeals to this court on our own motion. We hold that there was no error. We affirm the judgments of the Superior Court.

The plaintiffs were charged in disciplinary reports with assaulting another inmate in violation of prison rules.[4/] The disciplinary board

---

4/ The plaintiffs were charged with the following disciplinary offenses which are found in 103 Code Mass. Regs. §430.22 (18), (19), and (31) (1978):

"(18) Fighting with, assaulting or threatening another person with any offense against his person or property.

"(19) Use of obscene, abusive, or threatening language, action or gesture to any inmate or staff member.

(footnote continued)

held a separate hearing on the charges against each plaintiff. At each hearing, some exculpatory evidence was introduced. The board relied on other evidence, however, for its determinations that the plaintiffs had participated in an assault. That evidence consisted of testimony of Sergeant Maguire, who was a prison guard, and his written disciplinary report. The report presented in each case stated that on May 2, 1982, Maguire heard an inmate twice say loudly, "What's going on?" He saw some commotion close to the other side of a

---

(footnote continued)

"(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, making plans to commit any of the above offenses, shall be considered the same as commission of the offense itself."

door that had a window through which he had been looking. According to the report, Maguire quickly investigated and found an inmate bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. There were only three inmates other than the victim in the area at this time, and they were jogging away. Two of them were the plaintiffs. From these observations, Maguire concluded that "one or more of these inmates did assault [the victim] and apparently acted as a group as they were all jogging away from the scene together." Maguire's testimony at each hearing was substantially in accord with his report. We turn now to the merits of these appeals.

BEST AVAILABLE COPY

The rights and privileges that citizens ordinarily enjoy are necessarily diminished with respect to prison inmates, but an inmate is "not wholly stripped of constitutional protections." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In Wolff, the Supreme Court held that procedural due process requires that before an inmate can be deprived of a State-created liberty interest, he must be given advance written notice of the claimed violation, an opportunity to call witnesses and present evidence in the absence of undue hazard to institutional safety or correctional goals, and a written statement of the evidence relied on by the fact-finder and the reasons for any disciplinary action taken. Id.

at 563-567. "Massachusetts provides that every prisoner 'whose record of conduct shows that he has faithfully observed all the rules of his place of confinement' has a statutory right to have 'the term of his imprisonment reduced by a deduction . . .' of a determined period of time from his sentence. G.L. c. 127 §§129, 129C, and 129D. Such good time credits may be forfeited '[i]f a prisoner violates any rule of his place of confinement.' G.L. c. 127, §129, par. 1. The loss of such statutory good time credits affects a State-created liberty interest protected by the due process guarantees of the United States Constitution." Nelson v. Commissioner of Correction, 390 Mass. 379, 389 (1983).

BEST AVAILABLE COPY

The Supreme Court in Wolff was not required to rule, nor did it do so, on whether an inmate who is deprived of a State-created liberty interest by a disciplinary board is constitutionally entitled to judicial review of the sufficiency of the evidence to warrant the board's findings. However, such an entitlement logically follows from the court's holding with respect to the requirements of procedural due process, together with its reasoning that "a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly" (emphasis added). Wolff v. McDonnell, supra at 565.

Since "[t]he touchstone of due process is protection of the individual against arbitrary action," id. at 558, we conclude that before a prison inmate can be deprived of good time credits, in which he has a State-created liberty interest protected by due process guarantees of the United States Constitution, he is entitled not only to the procedural due process articulated in Wolff, but to judicial review of the sufficiency of the evidence to warrant the findings of the disciplinary board as well. Accord Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975). Independent review is necessary

to protect inmates against decisions affecting their liberty interests which may be made by prison officials in good faith, but nevertheless without legally adequate evidence to support them. Such review does not involve a de novo evidentiary hearing before a judge nor does it involve judicial second guessing with respect to the credibility of witnesses or the adoption of inferences. Judicial review is to be limited to the legal sufficiency of the evidence to support the disciplinary board's findings.

The defendant predicts substantial cost increases to the Department of Correction flowing from the necessity to keep meticulous records, and to the courts as well, if we rule that judicial

review of disciplinary board findings leading to the deprivation of good time credits is constitutionally required. We are not persuaded that the Department's record keeping costs will increase as a result of our recognizing inmates' rights to judicial review. Written records of disciplinary board proceedings are constitutionally required in any event. Wolff v. McDonnell, supra at 563-567. Undoubtedly, implementation of a right to judicial review will involve costs to the courts, and perhaps to the Department of Correction, but that consideration cannot justify a failure to ensure fundamental fairness in disciplinary proceedings.

Contrary to the defendant's argument, the availability of judicial review will not undercut the correctional goal of swift and sure punishment for misconduct in the prison setting. The forfeiture of good time credits does not ordinarily result in swift punishment because its impact is not felt by the inmate until, but for the forfeiture, his period of incarceration would be at an end.

The defendant presents two further arguments, the first being that since the Department of Correction is not subject to section 14 of the State Administrative Procedure Act, G.L. c. 30A, providing for judicial review of the decisions of administrative agencies, see G.L. c. 30A, §§1, and 1A,

the Legislature's intent that there be no judicial review in the circumstances of this case is clear. We do not consider the exclusion of the Department of Correction from G.L. c. 30A, §14, as indicating a legislative intent that inmates shall not be entitled to judicial review of the sufficiency of the evidence to warrant the findings of a disciplinary board resulting in the loss of good time credits, particularly in view of our conclusion that inmates have a constitutional right to such review.

The defendant's final argument with respect to the availability of judicial review is that prison cases should get no greater judicial review than do military cases and, the defendant says,

military cases do not receive judicial review of the sufficiency of the evidence to warrant court-martial findings. We will assume, in the defendant's favor, that judicial review is not available to determine the sufficiency of the evidence relied on by a military tribunal as the basis for its findings. The fact that Federal or State court review is unavailable in the military context, however, is not persuasive. No contention has been made that adequate review is not available within the system of military courts created by Congress.

The trial judge reviewed the evidence to determine whether there was some evidence which, if believed, would

rationally permit the board's findings.[5/] He concluded that such evidence had not been produced. We agree. The evidence, viewed as favorably to the defendant as logic will permit, demonstrates only that the plaintiffs, in the company of a third undisclosed inmate, were the only

---

5/ An alternative standard of review would be whether the board's findings were supported by "substantial evidence." Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion," taking "into account whatever in the record fairly detracts from its weight." New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981), quoting Boston Edison Co. v. Selectmen of Concord, 355 Mass. 79, 92 (1968), and Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966). In view of our conclusion that the trial judge rightly decided that the board's findings failed to meet the more lenient "some evidence" test, we need not decide whether that test or a stricter test is more appropriate.

inmates seen by the guard in the fenced area with the inmate who had been beaten, and that they fled the scene when the guard appeared. Of course, evidence of consciousness of guilt, together with other sufficiently probative evidence, may warrant a finding of guilt. Commonwealth v. Montecalvo, 367 Mass. 46, 55 (1975). However, even if the plaintiffs' flight could be considered as demonstrating more than the plaintiffs' reluctance either to inform on another inmate or be falsely accused of assault, one cannot fairly infer from the evidence before the board that more than one person struck the injured inmate, or that either plaintiff struck him or otherwise participated in the assault. We

conclude that the judge was correct in reviewing the sufficiency of the evidence to support the disciplinary board's findings, and that he correctly ruled that the evidence was insufficient.

Judgments affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT

JOSEPH CRAWFORD,
Plaintiff

V. No. 136746

JOSEPH PONTE,
Defendant

and

GERALD HILL

V. No. 136747

JOSEPH PONTE,
Defendant

MEMORANDUM AND ORDER

MEMORANDUM

FACTS

These cases raise the identical issue: Did a disciplinary board receive sufficient evidence to find plaintiff guilty of fighting, using a threatening

language or making a threatening gesture, or assisting another person to commit either of these offences?

The evidence, as stated in the Disciplinary Board's findings, came from a single witness who "heard a commotion, he checked [the victim] was picking himself off the ground, bleeding and hurt. He [i.e. the witness] saw 3 inmates jogging away, among them [Plaintiff]. They were the only three inmates in the area."

On this evidence, the Disciplinary Board concluded that the R/O i.e., Reporting Officer's testimony and observations show an assault occurred, his observation of inmate in the area indicated clear guilt.

DISCUSSION

In evaluating, for due-process-test purposes, the findings of a Disciplinary Board, a court does not grant a de novo hearing; nor does it evaluate the evidence. Instead, it merely ascertains whether the record contains some evidence supporting the Board's conclusion, Inglese v. Warden, 687 F.2d 362, 363 (11th Cir. 1982), bearing in mind that the Board need be persuaded only by a preponderance of the evidence.

Here, the evidence all came from an eyewitness (not an informant) whose testimony, if believed, established:

1. A commotion attracted his attention, but he did not observe fighting;

2. He observed the bleeding victim picking himself off the ground;
3. He observed three inmates (including both plaintiffs) jogging away from the scene; and
4. He observed no other inmates in the vicinity.

To support the Board, defendant relies principally on two decisions, Commonwealth v. Hogan, 375 Mass. 406 (1978), and Commonwealth v. Montecalvo, 367 Mass. 46 (1975).

Certainly, flight is evidence of consciousness of guilt. But flight alone is not evidence of guilt itself. In Commonwealth v. Hogan, supra, the evidence "warranted a finding that defendant thrust a knife into [the victim's] stomach," id. at 407. With

that as a foundation, the jury could infer that defendant's leaving the scene within a minute of the stabbing showed consciousness of guilt. In the present cases, the record contains no evidence analogous to the evidence in Commonwealth v. Hogan, supra, that defendant stabbed the victim.

In Commonwealth v. Montecalvo, supra, the evidence warranted a finding that defendant had been seen with the victim immediately before the crime, id. at 48, 55, at a time and place near where the victim was shortly thereafter found naked in a battered condition, id. at 55. Moreover, during the days after the incident, a friend of defendant's mother, whom he had never before telephoned, received "many, many calls

from defendant, asking about the victim and whether his clothes had been found," id. at 51-52.

In the instant case, the eyewitness did not see either plaintiff before or during the asserted embroglio. Even assuming that his observation of their "jogging away" constitutes evidence of consciousness of guilt - an inference which the foregoing analysis of the decisions shows to be tenuous indeed - the record is bare of any evidence of guilt. To ripen into the latter, the "jogging away" evidence requires "other evidence" id. at 55 linking either of the plaintiffs to an attack on the victim.

One might add, finally, that the record in plaintiff Crawford's case is indeed bare of any evidence that the victim was assaulted. The nature of the victim's injuries (described in the Disciplinary Report, but not in the Board's findings) does not prove an assault, as opposed to a fall; the evidence (again, in the Report but not in the findings) of "other signs of a scuffle (dirt astrewn [sic] in the same area)" does not establish an assault.

As to plaintiff Hill, the pertinent testimony from the Reporting Officer was "[the victim] has been beaten . . . [The officer] asked a medic his opinion how the injury [the victim] received. [sic] Medic states he was beaten."

It is intimated that plaintiff Hill sought to have the medic called to testify; in light of other infirmities in the record, as discussed previously, it is not necessary to consider the effect of any refusal to honor this request.

On the record before me, I conclude, as a matter of law, that the Board's finding of guilty rested, in each case, on no evidence constitutionally adequate to support that finding.

ORDER

Judgment to enter forthwith in each action as follows: The findings of the Disciplinary Board dated May 11, 1982, are voided, and all sanctions imposed pursuant thereto nullified; plaintiff is to be recredited forthwith with the 100

days' good time deducted pursuant to the said Board's findings.

Hiller B. Zobel
Justice of the Superior Court

Dated: January 25, 1983

NOV 9 PAGE 9

ORIGINAL

(8)

Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS
CLERK

84-438

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

S

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Jamie Ann Sabino
Klibaner & Sabino
402 Washington Street
Wellesley, MA 02181
(617) 237-7602

3PP

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents Gerald Hill and Joseph Crawford move the Court for an order permitting them to proceed in this Court, in forma pauperis, with their Opposition to the Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court of filed with this Court on September 17, 1984, pursuant to Rule 46 of the Rules of this Court. In support thereof the Respondents state that they are incarcerated within the custody of the Department of Correction and attach affidavits of indigency.

The Respondents further state that the Superior Court of Massachusetts allowed the Respondents to file the original complaints in this matter without fee based on their indigency. Respondents further state based on their indigency that counsel on appeal was appointed for Respondent Joseph Crawford and said appointed counsel's brief was accepted on behalf of Respondent Gerald Hill.

By their attorney,

Janie Ann Sabino
Klibaner and Sabino
402 Washington Street
Wellesley, MA 02181
(617)237-7602

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

Affidavit in Support of Motion to
Proceed on Appeal In Forma Pauperis

I, _____, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in Forma Pauperis and without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary which you received. Never employed

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? no

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

   no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no one

I understand that a false statement or answer to any question in this affidavit will subject me to penalities for perjury.

Joseph Crawford

Subscribed and sworn to before me this 19 day of October, 1984

Jamie Ann Sabino
Notary Public
My commission expires:

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

Affidavit in Support of Motion to
Proceed on Appeal In Forma Pauperis

I, Joseph Crawford, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in Forma Pauperis and without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary which you received. @ 1977 salary unknown

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? no

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, auto-mobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no

I understand that a false statement or answer to any question in this affidavit will subject me to penalities for perjury.

Gerald Mill

Subscribed and sworn to before me this 5 day of October, 1984

Jamie Ann Sabino
Notary Public
My commission expires:

ORIGINAL

Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS
CLERK

84-438

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Jamie Ann Sabino
Klibaner & Sabino
402 Washington Street
Wellesley, MA 02181
(617) 237-7602

RECEIVED
OCT 23 1984
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

TABLE OF CONTENTS

Table of Authorities.....ii

Summary of Argument.....1

Argument

A. The decision by the Massachusetts Supreme Judicial Court is in accordance with the vast weight of opinion and there is little conflict between the federal and state courts.....2

B. This is not an appropriate case in which to grant certiorari on the question of the standard of judicial review as the Massachusetts Supreme Judicial Court did not rule on this question.....6

C. The decision of the Massachusetts Supreme Judicial Court does not conflict with the applicable decisions of this Court.....8

Conclusion.....12

TABLE OF AUTHORITIES

Aikens v. Lash,
514 F.2d 55 (7th Cir. 1975) vacated and remanded
on other grounds, 425 U.S. 947 (1976), reinstated
as modified, 547 F.2d 372 (1976).....2,5,9

Blaney v. Commissioner of Corrections,
374 Mass. 337 (1978).....11

Burns v. Wilson,
346 U.S. 137 (1953).....10

Calloway v. Fauver,
544 F.Supp. 584 (D.N.J. 1982).....3,6

Chavis v. Rowe,
643 F.2d 1281 (7th Cir. 1981).....2,5,6,7

Edwards v. White,
501 F.Supp. 8 (M.D. Pa. 1979) aff'd, 633 F.2d 209,
and 633 F.2d 212 (3rd Cir. 1980).....3

Finney v. Mabry,
455 F.Supp. 756 (E.D.Ark. 1978).....3,6,7,8

Franklin v. Israel,
537 F.Supp. 1112 (W.D. Wis. 1982).....3,6

Green v. Fennel,
500 F.Supp. 870 (S.D. Miss. 1980).....3

Hewitt v. Dept. of Public Safety and Corrections,
38 Md. App. 710 (1978).....3

Hiatt v. Brown,
339 U.S. 103 (1950).....10

Hill v. Superintendent,
392 Mass. 198, 466 N.E.2d 818 (1984).....2,6

Inglese v. Warden, U.S. Penitentiary,
687 F.2d 362 (11th Cir. 1982).....3,6

Kritsky v. McGinnis,
313 F.Supp. 1247, (N.D.N.Y. 1979), aff'd,
456 F.2d 79 (2nd Cir. 1972), rev'd on other grounds,
411 U.S. 475 (1975).....3

Kyle v. Hanberry,
677 F.2d 1386 (11th Cir. 1982).....10

Nolan v. Scafati,
306 F.Supp. 1 (D.Mass. 1969), vacated on other
grounds, 430 F.2d 548 (1st Cir. 1970).....3,6

Ortwein v. Schwab,
410 U.S. 656 (1973).....10

Pollard v. Baskerville,
481 F.Supp. 1157 (E.D. Va. 1979), aff'd without decision, 620 F.2d 294 (4th Cir. 1979).....4

Riner v. Raines,
409 N.E.2d 575 (Ind. 1980).....5

Robson v. Beister,
53 Pa. Commw. 587, 420 A.2d 9 (1980).....5

Ruiz v. Estelle,
530 F.Supp. 1265 (D. Tex. 1980).....11

Russell v. Division of Corrections, Com. of Virginia,
392 F.Supp. 476 (W.D. Va) aff'd without decision
530 F.2d 969 (4th Cir. 1975).....4

Rutherford v. Pitchess,
457 F.Supp. 104 (D.Cal. 1978).....11

Sagerser v. Oregon State Penn., Corrections Division,
41 Or. App. 353 (1979).....3

Smith v. Rabalais,
659 F.2d 539 (5th Cir. 1981), cert. denied,
455 U.S. 992 (1982).....2,5,6,7,8

State ex rel. Meeks v. Gagnon,
95 Wis.2d 115 (1980).....3

United States ex rel. Speller v. Lane,
509 F.Supp. 796 (S.D.Ill. 1981).....3

Washington v. State,
405 So.2d 62 (Ala. Crim. Ct. App. 1981).....3,6

Whelchel v. McDonald,
340 U.S. 122 (1950).....10

Willis v. Ciccone,
506 F.2d 1011 (8th Cir. 1974).....2

Wilwording v. Swenson,
502 F.2d 844 (8th Cir. 1974), cert. denied,
420 U.S. 412 (1975).....2,5,6,8

Wolff v. McDonnell,
418 U.S. 539 (1974).....passim

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

A. The decision below by the Massachusetts Supreme Judicial Court is in accordance with the vast weight of opinion allowing judicial review of prison disciplinary matters in a limited proceeding looking only to the sufficiency of evidence supporting the prison disciplinary board's decision. There is only minimal conflict among state and federal courts on this issue. This conflict does not rise to a level justifying this Court's granting certiorari under Rule 17 of the United States Supreme Court rules.

B. Although there is some conflict on the required standard of review in judicial reviews of disciplinary actions, the Massachusetts Supreme Judicial Court specifically did not decide what test was more appropriate as the Court decided that the disciplinary board's finding did not even meet the more lenient test. As the

Massachusetts Supreme Judicial Court did not reach this issue this case is not an appropriate one in which to grant certorari to resolve what conflict does exist on the proper standard of review.

C. The decision of the Massachusetts Supreme Court does not conflict with applicable decisions of this Court.

ARGUMENT

A. The decision by the Masachusetts Supreme Judicial Court is in accordance with the vast weight of opinion and there is little conflict between federal and state courts.

In Hill v. Superintendent, 392 Mass. 198 (1984), the Massachusetts Supreme Judicial Court held that a person held in a correctional facility has a due process right to review of disciplinary proceedings for sufficiency of the evidence. This question has been presented to a number of federal and some state courts. The overwhelming weight of opinion holds that there is a substantive due process right to review for sufficiency of the evidence. This holding has been advanced by the Fifth, Seventh, Eighth and Eleventh circuits as well as district courts in New Jersey, Wisconsin, Mississippi, Arkansas, Illinois, New York and Pennsylvania and state courts in Alabama, Maryland, Wisconson and Oregon. Smith v. Rabelais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Chavis v. Rowe, 643 F.2d. 1218, 1287 (7th Cir. 1981) cert. denied, 454 U.S. 907 (1981); Aikens v. Lash, 514 F.2d. 55, 60 (7th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947 (1976), reinstated as modified, 547 F.2d 372 (7th Cir. 1976); Willis v. Ciccone, 506 F.2d. 1011, 1018, 1019, n. 11 (8th Cir. 1974); Wilwording v. Swenson, 502 F.2d. 844,

51 (8th Cir. 1974), cert. denied, 420 U.S. 412 (1975); Inglese v. Warden, 687 F.2d. 362, 363 (11th Cir. 1982); Calloway v. Fauver, 544 F.Supp. 584, 605 (D. N.J. 1982); Franklin v. Israel, 537 F.Supp. 1112, 1117 n. 3 (W.D. Wis. 1982); Green v. Fennell, 500 F.Supp. 870 (S.D. Miss. 1980); Finney v. Mabry, 455 F.Supp. 756, 770 (E.D. Ark. 1978); United States ex rel. Speller v. Lane, 509 F.Supp. 796, 800 (S.D. Ill. 1981); Edwards v. White, 501 F.Supp. 8, 11 (M.D. Pa. 1979), aff'd, 633 F.2d 209 and 633 F.2d 212 (3rd Cir. 1980); Kritsky v. McGinnis 313 F.Supp. 1247, 1250 (N.D.N.Y. 1970), aff'd sub nom., Rodriguez v. McGinnis, 456 F.2d. 79 (2nd Cir. 1972), rev'd on other grounds sub nom., Preiser v. Rodriguez, 411 U.S. 475 (1973); Washington v. State, 405 So.2d 62, 64 (Ala. Crim. Ct. App. 1981); Hewitt v. Dept. of Public Safety and Correctional Services, 38 Md. App. 710 (1978); State ex rel. Meeks v. Gagnon, 95 Wis.2d 115 (1980); Sagerser v. Oregon State Penn. Corrections Division, 41 Or. App. 353 (1979). The First Circuit has also touched upon this issue in Nolan v. Scafati, 306 F.Supp. 1, 3 (D. Mass. 1969), vacated on other grounds, 430 F.2d 548 (1st Cir. 1970). While Nolan did not involve a challenge to the sufficiency of the evidence at a disciplinary hearing, it assumed without deciding that the due process clause requires that disciplinary determinations be based on substantial evidence. It is clear that Judge Wyzanski felt there was enough support for this holding to make that assumption reasonable. It was his exact assumption, in fact, that was adopted as law in Kritsky v. McGinnis, supra at 1250.

The Petitioner points to two federal district court

cases affirmed without opinion by the Fourth Circuit and two state court cases as a basis for the statement that there is conflict among the federal and state courts. In looking at the Fourth Circuit affirmations, however, this conflict is not clear. Pollard v. Baskerville, 481 F.Supp. 1157, 1158 (E.D. Va. 1979), aff'd without opinion 620 F.2d 294 (4th Cir. 1980) is not actually on point. It addresses the issue of challenging the veracity of the facts relied on by the disciplinary board or committee and not the sufficiency of the facts found to uphold the decision. It is one thing to say that a court cannot review whether or not a person threatened a guard or other factual findings which would involve reviewing the witnesses' testimony and credibility, but quite a different thing to say that the court cannot accept the facts found but review their sufficiency to uphold a guilty finding.

In Russell v. Division of Corrections, Com. of Virginia, 392 F.Supp. 476, 477 (W.D. Va.), aff'd without opinion 530 F.2d 969 (4th Cir. 1975), the federal district court did rule that the sufficiency of the evidence, as well as the competency of the evidence and credibility of the witnesses were matters beyond its inquiry. This opinion (which came down prior to the holdings by the Fifth, Seventh and Eleventh Circuits and most of the other federal district courts), also addressed several other issues including denial of counsel and other procedural matters. It would be hard to state that an affirmance without an opinion is a definitive statement of the Fourth Circuit's position on the issue. It is conceivable that the Fourth Circuit chose not to address the issue of sufficiency of evidence because

based on the record it was clear that there was sufficient evidence, thus making a ruling unnecessary. In the absence of an opinion we cannot know. It is also important to note that the punishment in this case was confinement to a cell and not the loss of good time credits. With a liberty interest at stake the opinion of the Fourth Circuit might have been different than that of the district court.

An examination of the two state court cases indicates that a true conflict only exists with one case. Robson v. Biester, 53 Pa. Commw. 587, 420 A.2d 9, 12 (1980) is not a decision of the state court of last resort in Pennsylvania and the Pennsylvania Supreme Court has not ruled on this issue.

Therefore, the only true conflict that exists is between Riner v. Raines, 409 N.E.2d 575 (Ind. 1980) and the Fifth, Seventh, Eighth, and Eleventh circuits and the numerous federal district court and state cases cited above. Rule 17 states that a review on writ of certiorari is not a matter of right but of judicial discretion. It further states that it should be granted only when there are special and important reasons therefor. It should be noted that this Court has declined to grant certiorari in several of the circuit court cases that have addressed the issue at question. Smith v. Rabalais, supra; Chavis v. Rowe, supra; Wilwording v. Swenson, supra. This Court also did not address the issue when it granted certiorari in Aikens v. Lash, supra but instead vacated and remanded on other grounds.

In light of these strictures and the existence of only a minimal conflict among the many courts that have examined the

issue of judicial review of prison disciplinary board findings of guilt, this is clearly a case in which this Court should not grant certiorari.

B. This is not an appropriate case in which to grant certiorari on the question of the standard of judical review as the Massachusetts Supreme Judicial Court did not rule on this question.

As noted by the Petitioner, there is some difference among the courts mandating judicial review as to the standard of review. Some courts, notably Chavis v. Rowe, supra; Franklin v. Israel, supra; Calloway v. Fauver, supra; Nolan v. Scafati, supra; Washington v. State, supra, state that the guilty determination must be reviewed for substantial evidence. Other courts, notably Smith v. Rabalais, supra; Inglese v. Warden, supra; Finney v. Mabry, supra, indicate that the court should consider whether the decision is supported by some facts or any evidence at all. In the instant case, however, the Massachusetts Supreme Judicial Court chose not to rule upon whether the "substantial evidence" or the more lenient "same evidence" rule was the more appropriate. The Supreme Judicial Court concluded that the Board's findings failed to meet even the more lenient "some evidence" test. Hill v. Superintendent, 392 Mass. 198, 203, ftn. 5, 466 N.E.2d 818, 822, ftn. 5. As the issue of the standard of review is not decided in this case it would be an inappropriate vehicle for this Court to use to resolve conflicts among other courts.

The Petitioner also misreads the opinions in Smith v. Rabalais, supra, Inglese v. Warden, supra, and Wilwording v. Swenson, supra in postulating that the

Supreme Judicial court has come up with a different standard than either the "substantial evidence" of Chavis v. Rowe, supra or the "some evidence" of Smith v. Rabalais, supra. The Petitioner argues that by stating that it was reviewing the "legal sufficiency" of the evidence to support the disciplinary board's findings, the Supreme Judicial Court went beyond the standard of "any" evidence to support the board's findings. (Petition for Certiorari, p. 20-21). The Petitioner also states that there clearly was some evidence. (Petition for Certiorari, p. 20-21.) The Petitioner seems to be arguing that the "any evidence" standard means any evidence that might be relevant no matter how tenuous. Under such an interpretation of the "any evidence" standard, an inmate who was present in an institution on the day of a fight might be convicted even if the only evidence presented was his presence in the institution on the day in question. His presence at the institution on the day of the fight is certainly a relevant factor, but is far distant from evidence of guilt. Another example might be an inmate convicted of helping another to violate a regulation based only on the evidence that they knew each other. Again, the fact that they knew each other is relevant but only tenuously related to guilt. An "any evidence" standard would be a charade unless there were some test of the legal sufficiency of that evidence linking it to guilt. A reading of the cases that support the "any evidence" standard shows that the legal sufficiency of the evidence must be considered. In Finney v. Mabry, supra the Court specifically states that at some point what is labeled "evidence" cannot serve as a basis for fair fact finding.

Finney, at 770. The Court also refers to "proper evidence." Finney, Id.. Wilwording v. Swenson, supra indicates it would be "a violation of due process to convict and punish a man without evidence of his guilt." Wilwording, supra, at 851 (emphasis added). These cases are indications that the "any evidence" standard of Smith v. Rabalais is the standard used by the Massachusetts Supreme Judicial Court.

C. The decision of the Massachusetts Supreme Judicial Court does not conflict with the applicable decisions of this Court.

In Wolff v. McDonnell, 418 U.S. 539 (1974) this Court did not limit the right to substantive judicial review but actually provided requisites so that such review may be conducted. Although Wolff sets forth a comprehensive list of the procedural requisites that must be provided in prison disciplinary hearings, it does not review, discuss, mention or in any way refer to a limitation of the substantive due process right not to be found guilty except by the appropriate quantum of evidence. Wolff was brought to inquire into and redress faults in the procedural aspects of the Nebraska disciplinary hearings. It can not be said that because the Court did not go beyond the case and make rulings on the availability of a substantive review in any individual case, an issue not presented, that it meant to limit and deny that right. A careful reading of Wolff, in fact, indicates that the procedural requirements are designed to make it possible to have such a review. Specifically, "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for

the disciplinary action." Wolff, supra at 564. The Court stated that this was true even though the Nebraska system did not have a process of administrative appeals. The proceedings, the Court noted, might be used in other instances or collateral determinations by other public boards "and perhaps even the courts, where fundamental consitutional rights may have been abridged." Wolff, supra at 565. The Petitioner cites this portion of Wolff and goes on to state that Crawford and Hill recieved all the process due them and therefore suffered no abridgement of their consitutional rights. This statement both begs the question (which is whether being convicted with no or an insufficent amount of evidence is a violation of a fundamental consitutional right) and miscontrues what the Court requires to be reported in such a written statement. The Court does not state that there must be a written report by the factfinders as to the procedures followed at the hearing. The Court does not state that there must be a written report as to when and how the inmate received notice of the hearing or the factors that show the hearing was an impartial one. The requirement is that the written statement must show the evidence relied upon and the reasons for the action. Therefore, a review would be directed to that evidence and those reasons. As stated in Aikens v. Lash, supra at 60:

> As a practical matter, we fail to see the conflict defendants note between the term "substantial evidence" and the phrase "evidence relied on and reasons for the disciplinary action." Presumably, the Supreme Court did not contemplate in Wolff, where its use of the latter phrase in connection with the array of procedural rights provided was directed at protecting prisoners from subsequent collateral consequences, that these rights should be easily emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by the appropriate quantum of evidence. See e.g., Gomes v. Travisono, 510 F.2d 537,

49 (1st Cir. 1974); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974).

Preventing arbitrary determinations is the main thrust of Wolff and to do so sometimes the courts must create additional requirements. Wolff intends a genuine hearing and not a charade. Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982). If a board can find people guilty without some evidence, disciplinary hearings are that charade.

The Petitioner also relies on previous decisions of this Court that have stated that there is no general due process right to judicial review of administrative proceedings. In particular, the Petitioner cites Ortwein v. Schwab 410 U.S. 656 (19 3); Hiatt v. Brown, 339 U.S. 103 (1950) and Whelchel v. McDonald, 340 U.S. 122 (1950). These cases do not have a bearing on the instant matter. Ortwein involved the termination of welfare benefits, which as burdensome as that may be, does not involve a liberty interest. Hiatt and Whelchel involve the review of court-marital hearings. The instant case is not analogous to these military cases as the Framers of the Constitution specifically entrusted to Congress the authority and right to determine the rules for the government and regulation of the military. This Constitutional mandate sets the military apart from the civilian courts. Also, in military cases there is an extensive formal judicial hierarchy set up with a complete appellate system and provisions for ultimate review by a civilian court. Burns v. Wilson, 346 U.S. 137, 141, ftn. 7 (1953).

It must also be noted that, despite Petitioner's claim, the burden on the state is relatively little. The

Petitioner argues that this will cost the Department of Correction a great deal of money as there will have to be more meticulous recording of disciplinary proceedings and a change in those proceedings from informal administrative hearings into more formal, trial type hearings. This argument is without merit since the needed record is no more than what Wolff already requires.

The Petitioner also argues that there would be a cost to the Department and to the courts in increased litigation. Again, this would not be great as it would not require de novo hearings but rather reviews similar to those of other administrative agencies. There is no reason to believe that such hearings would impose a sustantial burden on our state courts. Allowing these limited reviews is a small cost to pay to protect a person's right not to be denied due process and not to arbitrarily lose hard-earned good time credits. It is well settled that constitutional protections cannot be denied for budgetary reasons. Blaney v. Commissioner of Correction, 374 Mass. 337, 372 N.E.2d 770 (1978); Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980); Rutherford v. Pitchess, 457 F.Supp. 104 (D. Cal. 1978). The Petitioner also presumes to argue that as the budgetary restrictions might affect the day to day life of the inmates it would be better for them not to have such a substantive due process review. This ignores the great desire on the part of inmates not to lose hard-earned good time credits, particulaly for no reason or with no basis in evidence.

Nor would judicial review undercut the legitimate correctional goal of sure and swift discipline for misconduct. As the Petitioner himself points out, the

sanction of isolation would probably be served (and serve its swift disciplinary function) before a matter reached the courts. Injunctions would only be imposed where the inmate has shown a likelihood of success on the merits. Unwarranted punishment is not a legitimate correctional goal. As the forfeiture of good time does not result in swift punishment, judical review could not hinder such a goal in that instance. Also, as the goal of good time credits themselves is to create incentives for obeying rules and good conduct, a halt to arbitrary forfeitures would enhance that goal. It is hard to expect a person to strive for credits that might be taken from him or her arbitrarily. Good conduct is not encouraged when a disciplinary system is a charade.

Nor would such a review place the courts in the position of second guessing the conclusions of adminstrators who have a better grasp of their domain. Again, the Respondent seeks not a review of the validity or credibilty of facts but a review as to whether the facts found constitute substantial evidence for the board's conclusion. This is a function that is reserved in many cases for our courts. It is, in fact, an important task of our courts in criminal matters. It is surely not contended that the F.C.C., the Department of Health and Human Services, the Commissioner of Insurance or any number of agencies or public officials are not expert in their own domains. Yet their actions are reviewed by the courts. Such review is a task that our society allocates to our judges.

CONCLUSION

It is respectfully submitted that for the above reasons the Petitioner has wholly failed to sustain its burden of

establishing under Rule 17 that there are special and important reasons why the writ should be granted. The Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted

Jamie Ann Sabino
Attorney for the Respondents
Klibaner and Sabino
402 Washington Street
Wellesley, Massachusetts 02181
(617) 237-7602

Office - Supreme Court, U.S
FILED
DEC 29 1984
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-438.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,
v.
GERALD HILL AND JOSEPH CRAWFORD,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Joint Appendix.

FRANCIS X. BELLOTTI,
Attorney General,

BARBARA A.H. SMITH,
Chief, Criminal
Appellate Division,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240
Counsel for Petitioner

JAMIE ANN SABINO,
KLIBANER & SABINO,
402 Washington Street,
Wellesley, Massachusetts 02181.
Counsel for Respondents

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Relevant docket entries, Norfolk County Superior Court, No. 136746 1a
Relevant docket entries, Norfolk County Superior Court, No. 136747 3a
Relevant docket entries, Appeals Court No. 83-414 5a
Relevant docket entries, Appeals Court No. 83-528 7a
Relevant docket entries, Supreme Judicial Court No. 3330 8a
Writ of habeas corpus ad testificandum (complaint) 9a
Answer (No. 136746) 12a
Answer (No. 136747) 14a
Respondent's motion for summary judgment (No. 136747) 16a
Massachusetts Department of Correction, Disciplinary Report 17a
Massachusetts Department of Correction, Disciplinary Hearing 19a
Memorandum from Peter Stephens to I.P.S. Investigation Team 21a
Massachusetts Correction Institution, Walpole, Appeal form 22a
Respondent's motion for summary judgment (No. 136746) 24a
Massachusetts Department of Correction, Disciplinary Report 25a
Massachusetts Department of Correction, Disciplinary Hearing 27a
Massachusetts Correctional Institution, Walpole, Appeal form 29a
Affidavit, No. 136746 31a
Affidavit, No. 136747 32a
Memorandum and Order (1/25/83) App. B to Pet.
Judgment (Summary) (Pursuant to Mass. R. Civ. P. 56) 33a
Notice of Appeal 34a
Opinion of the Supreme Judicial Court App. A to Pet.

Relevant Docket Entries.

NORFOLK COUNTY SUPERIOR COURT.
No. 136746.

1.	1982 Jun. 9	Action entered — Complaint Filed Complaint Ordered Filed without Fee, with Separate Docket Numbers for Each Plaintiff, Clerk to Make Service by Certified Mail-Copies to Attorney General (Dimond, J.) Dated June 8, 1982
2.	1982 Jun. 9	Certificate of Service
3.	1982 Aug. 5	Answer of Defendant
4.	1982 Dec. 28	Respondent's Return
5.	1982 Dec. 28	Defendant's Motion for Summary Judgment
6.	1982 Dec. 28	Defendant's Memorandum In Support of Motion for Summary Judgment
7.	1982 Dec. 28	Plaintiff's Pre-Trial Memorandum
8.	1982 Dec. 28	Plaintiff's Motion to have Witness Certified by the Court to Material Witness
9.	1983 Jan. 6	Affidavit of Arthur L. Isberg
	1983 Jan. 6	Re: Defendant's Motion for Summary Judgment-Continued to 1/13/83 for Submission on Briefs (Zobel, J.) (ns. 1/7/83)
10.	1983 Jan. 13	Supplemental Memorandum In Support of Defendant's Motion for Summary Judgment
11.	1983 Jan. 28	Memorandum and Order (Zobel, J.) (dated 1/25/83 (cs. 1/28/83)
	1983 Jun. 28	Re: Defendant's Motion for Summary Judgment-Denied-See Memorandum and Order of Zobel, J. dated 4/25/83 (Zobel, J.) (ns.)
12.	1983 Jan. 28	Summary Judgment (cs.)

13.	1983 Mar. 4	Defendant's Notice of Appeal Re: Order
14.	1983 Mar. 16	Defendant's Notice of Appeal from Final Judgment
15.	1983 Mar. 17	Notice of Service of Notice of Appeal (cs.) Mr. Joseph Crawford, Massachusetts Correctional Institution Box 100, South Walpole; The Honorable Hiller B. Zobel, Associate Justice of the Superior Court, Judges Lobby 1112 New Courthouse Building, Boston

A True Copy

Attest: _____
Deputy Assistant Clerk

Relevant Docket Entries.

NORFOLK COUNTY SUPERIOR COURT.
No. 136747.

1.	1982 Jun. 9	Action entered-Complaint Filed Complaint Ordered Filed Without Fee, With Separate Docket Numbers for each Plaintiff. Clerk to Make Service by Certified Mail-Copies to Attorney General (Dimond, J.) Dated June 8, 1982
2.	1982 Jun. 9	Certificate of Service
3.	1982 Aug. 5	Answer of Defendant
4.	1982 Dec. 28	Return of Respondent
5.	1982 Dec. 28	Defendant's Motion for Summary Judgment
6.	1982 Dec. 28	Defendant's Memorandum In Support of Motion for Summary Judgment
7.	1982 Dec. 28	Habe Issued Returnable 1/6/83
8.	1983 Jan. 6	Affidavit of Arthur L. Isberg
	1983 Jan. 6	Re: Respondent's Motion for Summary Judgment-Continued to 1/13/83 for Submission on Briefs (Zobel, J.) (ns.)
9.	1983 Jan. 13	Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment
10.	1983 Jan. 28	Memorandum and Order (Zobel, J.) Dated 1/25/83 (cs. 1/28/83)
	1983 Jan. 28	Re: Defendant's Motion for Summary Judgment-Denied: See Memorandum of Zobel, J.) dated 1/25/83 (Zobel, J.) (cs. 1/28/83)
11.	1983 Jan. 28	Judgment-Summary (cs.)
12.	1983 Mar. 4	Defendant's Notice of Appeal from Order for Summary Judgment

13. 1983 Mar. 16 Defendant's Notice of Appeal from Final Judgment

14. 1983 Mar. 16 Notice of Service of Notice of Appeal (cs.) Mr. Gerald Hill, M.C.I. Walpole, Box 100, South Walpole, Mass., The Honorable Hiller B. Zobel, Associate Justice of the Superior Court, Judges Lobby, 1112 New Courthouse Building, Boston

A True Copy

Attest: /s/ Barbara N. Heuser
Deputy Assistant Clerk

Relevant Docket Entries.

APPEALS COURT NO. 83-414.

1 Apr 11, 1983:	Letter received from Martin E. Levin, Asst. Atty. Gen., re: "I hereby request that the entry fee . . be waived". Filed.
2 Apr 11, 1983:	Re: Paper #1-Fee Waived.
3 Apr 11, 1983:	Entered.
4 May 6, 1983:	Appellant's Motion For Enlargement Of Time To File Brief & Appendix Until June 20, 1983, With Certificate Of Service, filed.
- May 6, 1983:	Re: Paper #4-Allowed (By The Court). * Notice To Counsel.
5 May 18, 1983:	Appellant's Motion for Consolidation of Cases A.C. 83-414 with A.C. 83-528 with Attachment and Certificates of Service, filed.
- May 18, 1983:	Re: paper #5 - Allowed. Appeals are consolidated for the purposes of briefing and oral argument, (Warner, J.). * Notice to Counsel.
6 Jun 20, 1983:	Appellant's Certificate of Service, (Brief & Appendix), filed.
7 Jul 11, 1983:	Plaintiff-Appellee's (Joseph Crawford), Motion for Enlargement of Time for Filing Brief to Aug. 9, 1983, with Certificate of Service & Notice of Hearing, filed.
- Jul 11, 1983:	Re: Paper #7-Allowed; By the Court. *Notice to Counsel.
8 Aug 9, 1983:	Plaintiff/Appellee's Motion For Enlargement Of Time For Filing Brief To Aug 17, 1983, With Affidavit & Certificate Of Service, filed.

- Aug 10, 1983:	Re: Paper #8 - Allowed: provided that the brief and appendix are filed no later than August 17, 1983. (Brown, J.). *Notice To Counsel.
9 Aug 22, 1983:	Plaintiff-Appellee's Certificate of Service, (Brief) filed.
10 Sep 22, 1983:	Motion to accept Brief on Behalf of Gerald Hill (Plaintiff-Appellee) or Appointment of Attorney, with Certificate of Service, filed.
- Sep 30, 1983:	Re: Paper #10 - The cases are so similar that the plaintiff Hill will have his case adequately represented by the brief filed by the plaintiff Crawford. The motion is allowed to the extent that the Crawford brief will be considered in Hill's case. (Armstrong, J.). *Notice To Counsel.
11 Oct 5, 1983:	Letter Dated 10/5/83 Addressed to F.J.S., Asst. Clerk from A.A.G. Martin E. Levin re: . . . "I respectfully request that the argument be rescheduled.", filed.
- Oct. 5, 1983:	Re: Paper #11 - Motion allowed. (Hale, C.J.). *Notice to Counsel.
- Oct 11, 1983:	ORDER . . . of S.J.C. Transferring Case Sua Sponte, filed. *Notice to Counsel.

Relevant Docket Entries.

APPEALS COURT NO. 83-528.

1	May 10, 1983:	Letter addressed to John E. Powers, Clerk from Asst. Atty. Gen'l., Martin E. Levin re: "Pursuant to M.R.A.P. 10(a) and M.G.L.C.262 §4, I hereby request that this appeal be docketed without payment of fee." Filed.
-	May 10, 1983:	Fee waived.
2	May 10, 1983:	Entered.
3	May 18, 1983:	Appellant's Motion for Consolidation of Cases A.C. 83-414 with A.C. 83-528 with Attachment and Certificates of Service, filed.
-	May 18, 1983:	Re: paper #3 - Allowed. Appeals are consolidated for the purposes of briefing and oral argument, (Warner, J.). * Notice to Counsel.
		SEE A.C. 83-414 FOR FURTHER DOCKET ENTRIES

Relevant Docket Entries.

SUPREME JUDICIAL COURT NO. 3330.

Motions Allowed by A.C.:	(1) Defendant/appellant's Motion for Consolidation of Cases. (2) Motion to accept Brief on Behalf of Gerald Hill - Allowed to the extent that the Crawford Brief will be considered in Hill's case.
10/13/83	Entered.
4-17-84	WAIVER of 130-Day Rule.
6/19/84	Judgments affirmed. Rescript June 19, 1984. Reasons as on file. Notice to counsel.
7/11/84	Defendant's Motion to Stay Rescript. Circulated to quorum.
7/24/84	Motion to Stay Rescript ALLOWED.
10-2-84.	NOTICE FROM SUPREME COURT OF THE UNITED STATES (dated 9-17-84) of the filing of a petition for certiorari.
11-15-84.	Order of the Supreme Court of the United States granting petition for writ of certiorari dated 11-13-84.

11/27/84

A true copy.

Attest: /s/ Jean M. Kennett
Clerk
Supreme Judicial Court for
the Commonwealth

COMMONWEALTH OF MASSACHUSETTS.

NORFOLK, SS.	SUPERIOR COURT CIVIL SESSION NO. 136746 [136747]
JOSEPH CRAWFORD GERALD HILL -VERSUS- JOSEPH PONTE	6/8/82 complaint ordered filed without fee with separate docket numbers for each plaintiff. Clerk to make service by certified mail. Copies to A.G. (Dimond, J.) att. R. Moscow, asst. clerk.

WRIT OF HABEAS CORPUS AND TESTIFICANDUM,
R E L E A S E , F O R T H W I T H -

Now comes the petitioners Joseph Crawford and Gerald Hill, in the above entitled caption and respectfuul invoke the Jurisdiction of this Court pursuant to G.L. Ch. 248 § 1 et seq.

F A C T S:

1. Each of the petitioners apear before the Disciplinary Board (henceforth D-Board) on or about May 12, 1982 and said Board violated each of the petitioners Constitutional Rights;

2. There was no direct evidence or indirect evidence to link either of the petitioners to the alleded assault upon one Peter Stephs, in fact the holding authorities had affidavits in their possession staking that each of the petitioners was not a person that might assault him;

3. The petitioner Hill requested that he be allowed to call a witness that would testify to the fact that he'd seen Stephs slip on the stairs, this witness was denied to the plaintiff and there was no just cause for said witness to be denied to the petitioner;

4. During the course of the hearing no evidence was given to the Board that either of the petitioners placed their hands on the alleded victim, nor was there any tangible evidence presented to the Board to connect either of the petitioners with an alleded assault that was supposed to of taken plade;

5. Each of the petitioners Constitutional Rights were violated in as much as an impartial hearing Body is concerned, none of the members of the Board were presented with evidence to connect either of the petitioners with an assualt nor are the Board members capable of stating that an assault took place, the Boards entire decision is based on something that the reporting officer can't even say took place;

MEMORANDUM OF LAW IN SUPPORT OF RELEASE:

It is fundamental to any fair hearing procedures that accused be judged by an impartial hearing body, for without the presence of impartial decision makers, fair procedures are meaningless. The Wolff court recognized that hearing bodies must not be so bias that their decisions are reached in an arbitrary manner. Ruiz v. Estelle, 503 F.Supp. 1265, 1355. In the instant case the decision of the Board is both arbitrary and capricious; there was no evidence to confirm that the incident took place nor was there any evidence to state that if the incident did take place the petitioners were involved. For years it has been settle law that: Mere presence does not establish guilt.

The witness was/were no threat to the security of the institution and were upstairs waiting to come to the Board, they did not come to the Board on their own accord due to the Rules and regulations, which in essence state that a man must have a pass. Yet, it was stated that these witnesses testimony was not needed, this testimony could of proven that each of the petitioners did not assault any one. In essence the board stated that they were going to find the petitioners guilty irregardless of

the petitioners clear innocence. The petitioners had a qualified procedural due process right to call witnesses in their defense at these disciplinary hearings. See: Ward v. Johnson, 667 F.2d 1126 at 1130.

Courts have also stated that the procedural protections depend upon the results of the Disciplinary ticket; in the instant case each of the petitioners were given 15 days isolation, it was also recommended that they lose 100 days good time and that they be locked up in Administrative segragation. Thus, due to the severity of the sanction the Board was required to call the witnesses in order that the hearing appear fair. Based upon the preponderance of the evidence that the Board must adjudge only clear innocence.

PRAYERS FOR RELIEF:

1. That this Court Temporially, Preliminarilly and Perminently enjoin the defendant from imposing any Isolation upon the petitioners until this matter has been fully heard.

2. After a full hearing upon this matter upon the merits, Rule that the petitioners were convicted by the D-Board in violation of the rules and regulations that govern said Board and order the matters expunged from any and all institutional folders/records kept on the petitioners.

By

/s/ Joseph Crawford
Joseph Crawford

/s/ Gerald Hill
Gerald Hill

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

NO. 136746

JOSEPH CRAWFORD,
Petitioner
V.
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Respondent

ANSWER

Now comes the respondent and answers the petition in the above-entitled action as follows:

1. He denies the allegations of paragraph one and avers that on May 11, 1982, petitioner received a Disciplinary Hearing regarding Disciplinary Report No. 82-1372.
2. He denies the allegations of paragraph two.
3. He denies the allegations of paragraph three, except that he admits that Gerald Hill requested that inmate Herbert Jones be called on Hill's behalf, which request was denied.
4. He denies the allegations of paragraph four.
5. He denies the allegations of paragraph five.

AFFIRMATIVE DEFENSE

6. Further answering, respondent states that Disciplinary Report No. 82-1372 reports that Sergeant Maguire found one P. Stephens (sic), an inmate at M.C.I.-Walpole, suffering from signs of a scuffle in the West Wing Yard, and that petitioner was one of only three other inmates

observed at the scene of the assault, and that these three inmates were jogging together away from the scene.

7. Sergeant Maguire testified at petitioner's hearing regarding his observations at the scene of the assault of Peter Stephens.

8. Petitioner received all process due him under the United States Constitution.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

by, /s/_____

MARTIN E. LEVIN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: 727-2240

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

NO. 136747

GERALD HILL,
Petitioner
V.
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Respondent

ANSWER

Now comes the respondent and answers the petition in the above-entitled action as follows:

1. He denies the allegations of paragraph one and avers that on May 11, 1982, petitioner received a Disciplinary Hearing regarding Disciplinary Report No. 82-1371.
2. He denies the allegations of paragraph two except that he admits that an affidavit made by Peter Stephens and entered by Gerald Hill stated that "Gerald Hill had nothing to do with my present injuries."
3. He denies the allegations of paragraph three, except that he admits that Gerald Hill requested that inmate Herbert Jones be called on Hill's behalf, which request was denied.
4. He denies the allegations of paragraph four.
5. He denies the allegations of paragraph five.

AFFIRMATIVE DEFENSE

6. Further answering, respondent states that Disciplinary Report No. 82-1371 reports that Sergeant Maguire

found one P. Stephens (sic), an inmate at M.C.I.-Walpole, suffering from signs of a scuffle in the West Wing Yard, and that petitioner was one of only three other inmates observed at the scene of the assault, and that these three inmates were jogging together away from the scene.

7. Petitioner Hill stated at his hearing that inmate Herbert Jones would, if called, testify that Hill and Jones had gone to and returned from the yard together.

8. The Disciplinary Board stated in the Disciplinary Hearing record that Jones' testimony was not necessary.

9. Sergeant Maguire testified at petitioner's hearing regarding his observations at the scene of the assault of Peter Stephens.

10. Petitioner received all process due him under the United States Constitution.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/ _____

MARTIN E. LEVIN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel. 727-2240

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
CIVIL NO. 136747

GERALD HILL,
Petitioner,
V.
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Respondent.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Now comes the respondent and moves for summary judgment denying the petition.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/ _____

Martin E. Levin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Dated: December 24, 1982

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY REPORT

DATE 5-2-1982 INSTITUTION WALPOLES

INMATE Gerald Hill NO. W36748 HOUSING UNIT EII

OFFENSE (18) (19) (31) D-REPORT NO. 82-1371

FIGHTING/THREATENING LANGUAGE OR JESTURE/ AIDING ANOTHER PERSON TO COMMITT ANY OFFENCE

MINOR ☐ MAJOR ☒ REFERRED TO DISTRICT ATTORNEY ☐

DESCRIPTION OF OFFENSE

ON THE ABOVE DATE AT APPROXIMATELY AT 8:45 AM WHILE ON DUTY AT THE WEST WING YARD GATE I (SGT. MAGUIRE) HEARD AN INMATE LOUDLY SAY "WHAT'S GOING ON?" (THE SOLID DOOR TO THE YARD WAS CLOSED AT THIS TIME) I THEN STARTED TO WATCH (FROM THE CORRIDOR) THROUGH THE SMALL WINDOW AND OUT TO THE MINIMUM WALKWAY.

AT THIS POINT I HEARD THE SAME VOICE SAY LOUDER "WHAT'S GOING ON!!?" AND AT APPX. THE SAME TIME I DID OBSREVE (THROUGH THE WINDOW) SOME COMMOTION CLOSE TO THE OTHER SIDE OF THE DOOR. I QUICKLY WENT DOWN THE STAIRS AND OPNED THE DOOR AND FOUND INMATE P. STEVENS BLEEDING FROM THE MOUTH, HIS EYE PUFFED OUT AND OTHER SIGNS OF A SCUFFLE (DIRT ASTREWN IN THE SAME AREA).

AT THE SAME TIME I OBSERVED 3 INMATES JOGGING AWAY TOGETHER DOWN THE WALKWAY; THEY WERE THE ONLY 3

INMATES WITHIN THE CHAIN-LINK FENCE AREA OF THE WALKWAY. INMATE G. HILL WAS ONE OF THESE INMATES. IT WAS EVIDENT THAT ONE OR MORE OF THESE INMATES DID ASSAULT INMATE STEVENS AND APPARENTLY ACTED AS A GROUP AS THEY WERE ALL JOGGING AWAY FROM THE SCENE TOGETHER.

REPORTING OFFICER
SIGNATURE /s/ Sgt. Peter Maguire TITLE Sgt. West Wing

SHIFT COMMANDER'S SIGNATURE /s/ E. Moreau/Captain

DISCIPLINARY OFFICER'S SIGNATURE /s/ Curtis

FINDING AND SANCTION, IF ANY _____
(transcribed from disciplinary hearing if major matter)
RESULTS OF APPEAL _____

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY HEARING

DATE OF HEARING 5/11 INSTITUTION Walpole

INMATE Hill, G. No. _____

OFFENSE #18, #19, #31 D-REPORT NO. 82-1371

The inmate has been advised of his right to remain silent since the offense charged has been or may be referred to the district attorney. ☐

The following is a summary of the credible evidence presented to the disciplinary board:

Plea/ not guilty

he knows nothing about it. Entered affidavit.

Sgt. Maguire, states he heard a commotion. He never saw an assault. Stevens had been beaten. He saw three inmates jogging away from the area. They were the only one's in the area. He asked a medic his opinion how the injury Steven's recieved. Medic states he was beaten. AA since May 2.

Request for H. Jones. Denied not necessary.

Finding: Guilty

Combine charges.

Sanction and Recommendations: 15 days iso. 100 LGT. DSU.

Reasons for Sanction and Recommendation: report testimony considered, the R/0 testimony and observations show an assault occurred. His observation of the inmate in the area indicates clear guilt. Assaults of any person is serious, thus the sanction.

The inmate has been advised of the finding, sanction and recommendations of the Board: ☒

The inmate has been advised of his right to appeal this decision within five (5) days. ☒

/s/ Isberg	/s/ Anna C. Walsh	/s/ LaPierre
(CHAIRMAN)	(MEMBER)	(MEMBER)

A copy of this document has been delivered to the inmate. ☒

Officer's Signature /s/ Isberg Date 5/11

From Peter Stephens
Bris one

To I.P.S. Investigation Team

Re Statement to Alledge inscident

The following statement I make under pains and penalties of perjury.

I so State these facts that Gerald Hill had nothing to do with my present injuries.

/s/ Peter Stephens
Respectfully
Mr. Peter Stephens
Bris one
M.C.I. Walpole MA.

Massachusetts Correctional Institution, Walpole

APPEAL FORM

Inmate's Name GERALD HILL No. W-36748
Report No. 82-1371

a. (Minor) If you wish to appeal the Disciplinary Officer's disposition of this case you may request the Disciplinary Board to review his findings. Such appeal must be made to the Disciplinary Officer, in writing, within 24 hours of the hearing. The Disciplinary Board will schedule a hearing within five days.

b. (Major) If you wish to appeal the Disciplinary Board's disposition of this case you may request the Superintendent to review the Board's findings. Such appeal must be made to the Deputy, in writing, within 5 days of the board hearing.

c. The Commissioner of Correction reviews all cases involving loss of good time.

(Use space below for your written appeal. Use extra sheets of paper if needed.)

MY APPEAL IS ATTACHED TO THIS FORM.
THANK YOU.

• • • • • •

RESULT OF REVIEW

After reviewing your case involving Disciplinary Report(s) #
Appeal Denied J. Ponte 5-20-82

Members of the Disciplinary Board

_____ _____ _____

_____

Superintendent

Notice delivered by: _____ Date: _____

TO: Mr. Joseph Ponte, Superintendent
FR: Mr. Gerald Hill, Essex II, #39.
RE: APPEAL OF DISCIPLINARY BOARD'S DECISION(S)

May 15, 1982

Dear Superintendent Ponte:

My reasons for appealing the findings and sanctions of the D-Board will be short.

Sir, the Reporting Officer's D-Report in no way supports any finding of guilt on my part to any assault on inmate Stephens.

It was not until I came in from the yard that Mr. Maguire told me I was being placed in A.A.; this was around 11:00 A.M., several hours after the so-called assault on inmate Stephens.

At the D-Hearing, Officer Maguire stated that he did not see anything, nor did he see me strike or throw any punches at inmate Stephens. I requested that this Medic be allowed to testify at the D-Hearing or an offer of proof be presented to corroborate Mr. Maguire's statements concerning what the Medic told him. This was denied me as not necessary.

When I asked Mr. Maguire how/why he felt I may have been one of the guys he stated: "Because you three guys are always together. I asked him if he seen my face, he said no; what was I wearing, he said inmate clothing but could not describe them at the Hearing.

Sir, the only eye witness I requested was inmate Herbert Jones. The offer of proof he would of presented is that he and I went to the yard together and came in together. But this request was denied also as not necessary. I also introduced an Affidavit from inmate Stephens stating that I did not have anything to do with assaulting him physically or verbally.

I am respectfully asking that you Dismiss the charges as the Reporting Officer did not prove his report by the preponderancy of the evidence needed for the D-Board to reach the conclusion they did in this case.

Thank you very much for taking the time in reading this appeal and understanding my position.

Sincerely,
/s/ Gerald Hill

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS. SUPERIOR COURT
CIVIL NO. 136746

JOSEPH CRAWFORD,
Petitioner, RESPONDENT'S MOTION FOR
V. SUMMARY JUDGMENT
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Respondent.

Now comes the respondent and moves that summary judgment be granted denying the petition.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/_____

Martin E. Levin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Dated: December 27, 1982

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY REPORT

DATE 5-2-1982 INSTITUTION WALPOLES

INMATE Joseph Crawford NO. W37691
HOUSING UNIT EIII#19

OFFENSE (18) (19) (31) D-REPORT NO. 82-1372

FIGHTING/THREATENING LANGUAGE OR JESTURE/ AIDING ANOTHER PERSON TO COMMITT ANY OFFENCE

MINOR ☐ MAJOR ☒ REFERRED TO DISTRICT ATTORNEY ☐

DESCRIPTION OF OFFENSE

ON THE ABOVE DATE AT APPROXIMATELY AT 8:45 AM WHILE ON DUTY AT THE WEST WING YARD GATE I (SGT. MAGUIRE) HEARD AN INMATE LOUDLY SAY "WHAT'S GOING ON?" (THE SOLID DOOR TO THE YARD WAS CLOSED AT THIS TIME) I THEN STARTED TO WATCH (FROM THE CORRIDOR) THROUGH THE SMALL WINDOW AND OUT TO THE MINIMUM WALKWAY.

AT THIS POINT I HEARD THE SAME VOICE SAY LOUDER "WHAT'S GOING ON!!?" AND AT APPX. THE SAME TIME I DID OBSREVE (THROUGH THE WINDOW) SOME COMMOTION CLOSE TO THE OTHER SIDE OF THE DOOR. I QUICKLY WENT DOWN THE STAIRS AND OPNED THE DOOR AND FOUND INMATE P. STEVENS BLEEDING FROM THE MOUTH, HIS EYE PUFFED OUT AND OTHER SIGNS OF A SCUFFLE (DIRT ASTREWN IN THE SAME AREA).

AT THE SAME TIME I OBSERVED 3 INMATES JOGGING AWAY TOGETHER DOWN THE WALKWAY; THEY WERE THE ONLY 3

INMATES WITHIN THE CHAIN-LINK FENCE AREA OF THE WALKWAY. INMATE J. CRAWFORD WAS ONE OF THESE INMATES. IT WAS EVIDENT THAT ONE OR MORE OF THESE INMATES DID ASSAULT INMATE STEVENS AND APPARENTLY ACTED AS A GROUP AS THEY WERE ALL JOGGING AWAY FROM THE SCENE TOGETHER.

REPORTING OFFICER
SIGNATURE /s/ Sgt. Peter Maguire TITLE Sgt. West Wing

SHIFT COMMANDER'S SIGNATURE /s/ E. Moreau/Captain

DISCIPLINARY OFFICER'S SIGNATURE /s/ Curtis

FINDING AND SANCTION, IF ANY _____
(transcribed from disciplinary hearing if major matter)
RESULTS OF APPEAL _____

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY HEARING

DATE OF HEARING 5/11 INSTITUTION Walpole

INMATE Crawford, J. No. _____

OFFENSE #18, #19, #31 D-REPORT NO. 83-1372

The inmate has been advised of his right to remain silent since the offense charged has been or may be referred to the district attorney. ☐

The following is a summary of the credible evidence presented to the disciplinary board:

Plea/ not guilty

he does not know what happened

Stevens wrote an affidavit stating his innocence. His body was checked for signs of a scuffle, nothing was found.

Sgt. Maguire, he heard a commotion, he checked. Stevens was picking himself off the ground, bleeding and hurt. He saw 3 inmates jogging away, among them Crawford. They were the only 3 inmates in the area.

Finding: Guilty

Combine charges.

Sanction and Recommendations: 15 days iso. 100 LGT. DSU.

Reasons for Sanction and Recommendation: report and testimony considered, the R/0 testimony and observations show an assault occurred, his observation of inmate in the area indicates clear guilt. Assaults of any person is serious, thus the sanction.

The inmate has been advised of the finding, sanction and recommendations of the Board ☒

The inmate has been advised of his right to appeal this decision within five (5) days. ☒

/s/ Isberg	/s/ Anna C. Walsh	/s/ LaPierre
(CHAIRMAN)	(MEMBER)	(MEMBER)

A copy of this document has been delivered to the inmate. ☒

Officer's Signature /s/ Isberg Date 5/11

Massachusetts Correctional Institution, Walpole

APPEAL FORM

Inmate's Name JOSEPH CRAWFORD No. W-37691
Report No. 82-1372

a. (Minor) If you wish to appeal the Disciplinary Officer's disposition of this case you may request the Disciplinary Board to review his findings. Such appeal must be made to the Disciplinary Officer, in writing, within 24 hours of the hearing. The Disciplinary Board will schedule a hearing within five days.

b. (Major) If you wish to appeal the Disciplinary Board's disposition of this case you may request the Superintendent to review the Board's findings. Such appeal must be made to the Deputy, in writing, within 5 days of the board hearing.

c. The Commissioner of Correction reviews all cases involving loss of good time.

(Use space below for your written appeal. Use extra sheets of paper if needed.)

MY APPEAL IS ATTACHED TO THIS FORM.
THANK YOU.

• • • • • •

RESULT OF REVIEW

After reviewing your case involving Disciplinary Report(s) #
Appeal Denied J. Ponte 5-20-82

Members of the Disciplinary Board

_____ _____ _____

_____

Superintendent

Notice delivered by: _____ Date: _____

APPEAL

RE: DISCIPLINARY HEARING HELD ON MAY 11, 1982.

May 16, 1982

Dear Superintendent Ponte:

On May 11, 1982, I was seen by the Disciplinary Board and found guilty of the following charges: Fighting, offense number 18; Threatening language or jesture, offense number 19; and, Aiding another person to commit any offense, offense number 31. I am appealing to you as I believe you will render me proper justice.

At the D-Hearing, nothing was presented by the Reporting Officer -Mr. Maguire- that anyone on the D-Board could draw any conclusion of a preponderance of the evidence that I committed any infractions against the Rules and Regs.

Mr. Maguire himself stated that he called me back along with another inmate and then told me I could leave and go back out to the yard, after I informed him I didn't know what he was talking about . . . concerning a fight with inmate Stephens.

I was called some time later to report to Control. When I came in from the yard, I was taken into the Hospital for a physical check to see if I had any blood/or other evidence that I was involved in any kind of altercations with inmate Stephens . . . I was not. Officer Maguire then told me that I was being placed in A.A. Status to seen by the I.P.S.

Mr. Ponte, I am asking that you rescind the findings and sanctions of the D-Board as they had no evidence to support their conclusion. As a matter of fact they did not in any way exercise the powers invested in them in that they could have called inmate Stephens to the D-Board, or spoken with him out of my presence. I know personally that inmate Stephens would have corroborated that I did not at any time assault him. I presented an Affidavit in support of this from inmate Stephens.

I wish to thank you for taking the time in reading this appeal and seek your full understanding; again, thank you.

Yours truly,

/s/ Joseph C. Crawford

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
CIVIL NO. 136746

JOSEPH CRAWFORD,
Plaintiff
V.
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Defendant

AFFIDAVIT

I, Arthur L. Isberg, being duly sworn do hereby depose and say the following:

1. I served as Disciplinary Chairman at inmate Joseph Crawford's disciplinary hearing regarding Disciplinary Report (D-Report) #82-1372, at M.C.I., Walpole.

2. D-Report #82-1372 charged that Joseph Crawford and two other inmates had assaulted inmate Peter Stevens.

3. During his hearing, Mr. Crawford stated that he had an affidavit from Peter Stevens exonerating Crawford, but Mr. Crawford did not introduce that affidavit into evidence.

4. Joseph Crawford did not request any witnesses at his hearing.

5. The disciplinary board found that Joseph Crawford, along with the two other charged inmates, had assaulted Peter Stevens.

Signed under the pains and penalties of perjury this 5 day of January, 1983.

/s/_____
ARTHUR L. ISBERG

/s/ Mary H. Schmitt
NOTARY PUBLIC
My Commissioner Expires:
10/28/88

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
CIVIL NO. 136747

GERALD HILL,
Plaintiff
V.
JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Defendant

AFFIDAVIT

I, Arthur L. Isberg, being duly sworn do hereby depose and say the following:

1. I served as Disciplinary Chairman at inmate Gerald Hill's disciplinary hearing regarding Disciplinary Report (D-Report) #82-1371, at M.C.I., Walpole.

2. D-Report #82-1371 charged that Gerald Hill and two other inmates had assaulted inmate Peter Stevens.

3. Mr. Hill requested inmate Herbert Jones as a witness.

4. The Reporting Officer, Sergeant Maguire, had already stated that he had seen three inmates in the area of the assault on Stevens, and Herbert Jones was not identified as one of those inmates.

5. The disciplinary board denied Mr. Hill's request for Herbert Jones on the ground that Jones was not necessary for the purpose of the hearing.

6. The disciplinary board found that Gerald Hill, along with the two other charged inmates, had assaulted Peter Stevens.

Signed under the pains and penalties of perjury this 5 day of January, 1983.

/s/ _____
ARTHUR L. ISBERG
/s/ Mary H. Schmitt
NOTARY PUBLIC
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 136746 [136747]

JOSEPH CRAWFORD,
[GERALD HILL]
. . . . . *Plaintiff(s)*

v.

JOSEPH PONTE
. . . . . *Defendant(s)*

JUDGMENT
(SUMMARY)
(PURSUANT TO MASS. R. CIV. P. 56)

This action came on to be heard before the Court, Zobel J. presiding, upon motion of the defendant Joseph Ponte for summary judgment pursuant to Mass. R. Civ. P. 56 - the parties having been heard-and the Court having considered the *pleadings- and affidavits. DENIES said motion and orders judgment to enter it is ORDERED and ADJUDGED that:

The findings of the Disciplinary Board dated May 11, 1982, are voided, and all sanctions imposed pursuant thereto nullified; plaintiff is to be recredited forthwith with the 100 days' good time deducted pursuant to the said Board's Findings.

Dated at Dedham, Massachusetts, this 28th day of January 1983.

FORM OF JUDGMENT APPROVED Nicholas Barbadoro Clerk

..... By: /s/.....

Associate Justice of the Superior Court Assistant Clerk

*Strike out inapplicable words.

A True Copy Attest /s/Marie L. Crowley
Deputy Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS SUPERIOR COURT
CIVIL NO. 136746 [136747]

JOSEPH CRAWFORD,
[GERALD HILL]
Plaintiff,

V. NOTICE OF APPEAL

JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Defendant.

Notice is hereby given that Joseph Ponte, the above-named defendant, appeals from the final judgment entered in this action on January 28, 1983.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/_____

Martin E. Levin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Dated: March 15, 1983

Office-Supreme Court, U.S.
FILED
DEC 29 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-438.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,

v.

GERALD HILL AND JOSEPH CRAWFORD,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief of the Petitioner.

FRANCIS X. BELLOTTI,
Attorney General,

BARBARA A.H. SMITH,
Assistant Attorney General, Chief,
Criminal Appellate Division,
Counsel of Record

MARTIN E. LEVIN,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

38

Questions Presented.

I. Whether prison inmates have a substantive due process right to judicial review of prison disciplinary board findings?

II. Whether, under the due process clause, the findings of a prison disciplinary board should be reviewed under a standard more stringent than review for action which is arbitrary, capricious, or an abuse of discretion?

Table of Contents.

Opinions below 1

Jurisdiction 2

Constitutional provision involved 2

Statement of the case 2

Statement of facts 3

Summary of the argument 4

Argument 5

I. There is no constitutional right to judicial review for the legal sufficiency of the evidence adduced at a prison disciplinary hearing 5

A. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) does not mandate judicial review 5

B. Lower federal court decisions do not require review of the sufficiency of evidence in disciplinary hearings 9

C. Entitlement to procedural protections in general, does not imply a concomitant right to review for sufficiency of the evidence 12

II. The substantive content of the due process clause is the protection against arbitrary governmental deprivation of some right 15

A. The requisite procedural protections are determined by the specific context of the proceeding 15

B. Substantive due process review of prison disciplinary board findings should be limited to errors which are so flagrant or manifest as to constitute an arbitrary deprivation of the prisoner's liberty interest 17

Conclusion 22

Addendum 23

Table of Authorities Cited.

CASES.

Association for Reduction of Violence v. Hall, 558 F.Supp. 661 (D. Mass. 1983), vacated on other grounds, 734 F.2d 63 (1st Cir. 1984) 20n

Baxter v. Palmigiano, 425 U.S. 308 (1976) 11, 21n

Bell v. Wolfish, 441 U.S. 520 (1979) 17, 19

Block v. Rutherford, U.S. , 104 S.Ct. 3227 (1984) 16, 19

Bowling v. United States, 552 F.Supp. 54 (Ct. Cl. 1982), aff'd, 713 F.2d 1558 (Fed. Cir. 1983) 14

Burns v. Wilson, 346 U.S. 137 (1953) 14, 19

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 15

Cepulonis v. Fair, 732 F.2d 1 (1st Cir. 1984) 20n

Dreyer v. Illinois, 187 U.S. 71 (1902) 7

Glick v. Sargent, 696 F.2d 413 (8th Cir. 1983) 11

Goldberg v. Kelly, 397 U.S. 254 (1970) 8, 12

Goss v. Lopez, 419 U.S. 565 (1975) 21

Griffin v. Illinois, 351 U.S. 12 (1956) 7

Hanrahan v. Lane, No. 82-2892 (7th Cir. October 30, 1984), slip opinion at 6 6

Hewitt v. Helms, 459 U.S. 460 (1983) 15, 16, 18

Hiatt v. Brown, 339 U.S. 103 (1950) 14

Hill v. Superintendent, Massachusetts Correctional Institution, Walpole, 392 Mass. 198, 466 N.E.2d 818 (1984) 1, 5, 6n, 9, 14n

Hudson v. Palmer, U.S. , 104 S.Ct. 3194 (1984) 16

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 17

Jones v. Wittenburg, 509 F.Supp. 653 (N.D. Ohio 1980) 20n

Joseph Crawford and Gerald Hill v. Joseph Ponte, Civil Nos. 136746 and 136747 (Norfolk, SS. January 25, 1983) 1

Landon v. Plasencia, 459 U.S. 21 (1982) 13n, 16

Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973), aff'd, 417 U.S. 733 (1974) 14

Lindsey v. Normet, 405 U.S. 56 (1972) 7

Mathews v. Eldridge, 424 U.S. 319 (1976) 15, 16

McGinnis v. Stevens, 543 P.2d 1221 (Ala. 1975) 11

McKane v. Durston, 153 U.S. 684 (1894) 7

Meachum v. Fano, 427 U.S. 215 (1976) 16, 18

Middendorf v. Henry, 425 U.S. 25 (1976) 17

Morrissey v. Brewer, 408 U.S. 471 (1972) 6, 8n

Olim v. Wakinekona, 461 U.S. 238 (1983) 18

Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) 5, 12

Owings v. Secretary of United States Air Force, 447 F.2d 1245 (D.C. Cir. 1971), cert. denied, 406 U.S. 926 (1972) 14

Parham v. J.R., 442 U.S. 584 (1979) 21

Parker v. Levy, 417 U.S. 733 (1974) 16

Redding v. Fairman, 717 F.2d 1105 (7th Cir. 1983), cert. denied, 104 S.Ct. 1282 (1984) 11

Reetz v. Michigan, 188 U.S. 505 (1903) 7

Rhodes v. Chapman, 452 U.S. 337 (1981) 20n

Riner v. Raines, 274 Ind. 113 (1980) 8

Russell v. Division of Corrections, Commonwealth of Virginia, 392 F.Supp. 476 (W.D. Va. 1975), aff'd, 530 F.2d 969 (4th Cir. 1975) 10

Schlesinger v. Councilman. 420 U.S. 738 (1975) 14, 19

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 13

Scott v. DeJarnette, 470 F.Supp. 766 (E.D. Ark. 1979) 11

Smith v. Rabalais, 659 F.2d 539 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982) 9, 10

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 18

Tisi v. Tod, 264 U.S. 131 (1924) 12, 13, 19

United States v. Augenblick, 393 U.S. 348 (1969) 14, 19

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) 13

Whelchel v. McDonald, 340 U.S. 122 (1950) 14

Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974) 10, 11

Wilwording v. Swenson, 502 F.2d 844 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975) 9, 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 4, 5, 6, 7, 8 et seq.

STATUTES.

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 4, 9, 10, 11

Massachusetts General Laws
c. 30A, §§ 1(2) and 1A 6n
c. 249, § 4 6n

REGULATIONS.

103 Code Mass. Regs.
§ 430.11 19n
§ 430.18 14n
§ 430.22 17

MISCELLANEOUS.

Correctional Disciplinary Statistics–1980, Mass. Dept. Correction, Table 4, p. 12 (1983) 19n

Burger, An Agenda for Crime Prevention and Correctional Reform, 67 ABA Journal 988 (1981) 20n

Burger, More Warehouses, or Factories with Fences?, 8 New Eng. J. Prison Law 111 (1982) 20n

Widener, Foreward: The Impact of Judicial Decision-Making, 37 Wash. and Lee L. Rev. 373 (1980) 20n

Phillips, Foreward: Fourth Circuit Review, 39 Wash. and Lee L. Rev. 425 (1982) 20n

Sourcebook of Criminal Justice Statistics, U.S. Dept. of Justice, Table 5.8, p. 469 (1982) 20n

Jacobs, Stateville: The Penitentiary in Mass Society, 106 (1977) 20n

Bershad, The Law and Corrections: A Management Perspective, 4 New Eng. J. Prison Law 49 (1977) 20n

Singer, Prisoner Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade, 44 Federal Probation 3 (1980) 20n

Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979) 20n

No. 84-438.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,

v.

GERALD HILL AND JOSEPH CRAWFORD,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief of the Petitioner.

Opinions Below.

The opinion of the Supreme Judicial Court, *Hill* v. *Superintendent, Massachusetts Correctional Institution, Walpole (and a companion case)*, is reported at 392 Mass. 198, 466 N.E.2d 818 (1984), and is reproduced as App. A to the Petition for Writ of Certiorari. The opinion of the Massachusetts Superior Court is unreported. *Joseph Crawford and Gerald Hill* v. *Joseph Ponte*, Civil Nos. 136746 and 136747 (Norfolk, SS. January 25, 1983). It is reproduced as App. B to the Petition for Writ of Certiorari.

Jurisdiction.

The decision of the Supreme Judicial Court was issued June 19, 1984. Issuance of the rescript was stayed, on motion, pending the filing of a Petition for Writ of Certiorari. The petition for writ of certiorari was filed on September 17, 1984, and was granted on November 13, 1984. The jurisdiction of this Court is claimed under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Statement of the Case.

The respondents, Hill and Crawford, are inmates in the care and custody of the Massachusetts Department of Correction. On June 8, 1982, Hill and Crawford filed *pro se* complaints in Massachusetts Superior Court, against Joseph Ponte, Superintendent of the Massachusetts Correctional Institution (M.C.I.), Walpole. The complaints challenged the sufficiency of the findings of a Walpole disciplinary board, removing good time credits, on the ground, *inter alia*, that the findings were not supported by the evidence before the board (J.A. 9a).

Ponte moved for summary judgment. After submission of pertinent records and affidavits, the court denied Ponte's Motions for Summary Judgment and granted Summary Judgment

in favor of Hill and Crawford, "voiding" the findings of the disciplinary board and restoring good time which had been lost by Hill and Crawford as a result of the disciplinary proceedings (J.A. 33a).

On appeal, the Supreme Judicial Court held that, under the Due Process Clause of the United States Constitution, prison inmates are entitled to judicial review of the sufficiency of the evidence supporting a disciplinary board's findings. Affirming the ruling of the Superior Court, the Supreme Judicial Court held that there was insufficient evidence to permit the disciplinary board's findings (App. A to Pet.)

Statement of Facts.

On May 2, 1982, Hill and Crawford, inmates at M.C.I., Walpole, each received a prison disciplinary report. They were each charged with 1) fighting with, assaulting or threatening another inmate, 2) use of obscene, abusive or threatening language, action, or gesture to an inmate, and 3) attempting to commit, aiding another to commit, or making plans to commit the foregoing offenses.

On May 11, 1982, Crawford and Hill each received a disciplinary hearing on the above charges. At Hill's hearing, the board considered the testimony and report from the reporting officer, Sergeant Maguire. Maguire heard an inmate twice say loudly, "What's going on?" Through a window he saw some commotion close to the other side of a door. Upon immediate investigation, Maguire found an inmate (Peter Stephens) bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. Maguire saw only three inmates other than the victim within the bounded area, and they were jogging away

together. Two of the three jogging inmates were Hill and Crawford. Maguire also told the board that the medic stated that Stephens had been beaten. Hill testified that he knew nothing about the incident. He also offered an affidavit from the assaulted inmate stating that "Gerald Hill had nothing to do with my present injuries" (J.A. 17a).

At Crawford's hearing, the board heard essentially the same evidence from Sergeant Maguire.[1] Crawford testified that he did not know what happened and that he had been checked for signs of a scuffle and nothing was found. Crawford further told the board that the victim had written an affidavit stating that Crawford was innocent (J.A. 27a).

The board found that Hill and Crawford, along with the third inmate observed by Maguire, had planned, aided, or participated in the charged assault (J.A. 27a). The board combined all of the charges into one offense, and recommended sanctions of fifteen days in isolation and 100 days loss of good time for Hill and Crawford (J.A. 27a). On May 20, 1982, Superintendent Ponte, denied each inmate's appeal of the disciplinary board's findings (J.A. 29a).

Summary of the Argument.

The Supreme Judicial Court held that inmates have a constitutional right to judicial review of the sufficiency of evidence upon which a disciplinary sanction, resulting in loss of "good time" credits, is levied. The holding neither follows from *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), nor does it accord with lower federal court decisions regarding the scope of judicial review in proceedings pursuant to 42 U.S.C. § 1983.

---

[1] The hearing record from Crawford's hearing does not indicate that Maguire told the board of the medic's conclusion that Stephens had been beaten (J.A. 27a).

Historically this court has held that there is no constitutional right to appellate review. Moreover, pursuant to *Wolff* the only due process requirements in the context of prison disciplinary hearings are procedural protections designed to protect the fundamental constitutionally protected right to be free from arbitrary and capricious deprivation of a recognized liberty or property interest. The procedural requirements enunciated in *Wolff* are not consistent with judicial review of the sufficiency of the evidence. The establishment of procedural protections has not led to establishment of judicial review of sufficiency of the evidence claims in analogous situations. See *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). In fact such review has been specifically rejected in the context of courts-martial and deportation hearings (pp. 5-15).

Given the fundamental purpose of the due process clause and the necessary flexibility which must be accorded prison officials in maintaining internal discipline, judicial review must be limited. Once the procedural requirements of *Wolff* have been observed, the only further due process requirement is that an inmate not suffer deprivation of a liberty interest as a result of arbitrary or capricious official action. In reaching this determination the Federal Courts have limited review to whether "any evidence" supports the decision (pp. 15-22).

Argument.

I. There Is No Constitutional Right to Judicial Review for the Legal Sufficiency of the Evidence Adduced at a Prison Disciplinary Hearing.

A. Wolff *v.* McDonnell, *418 U.S. 539 (1974) Does Not Mandate Judicial Review.*

In *Hill* v. *Superintendent, M.C.I., Walpole*, 392 Mass. 198, 466 N.E.2d 818 (1984), the Supreme Judicial Court held that

an inmate who is deprived of a state-created liberty interest by a prison disciplinary board is entitled, under the due process clause, to judicial review of the legal sufficiency of the evidence supporting the disciplinary board's findings.[2] Though this right apparently does not encompass a *de novo* evidentiary hearing, it does entail "independent review" by the court of the legal adequacy of the evidence before the board, even where the board's decision was made in good faith and regardless of whether the inmate has received all of the procedural due process protections to which he has a right. 392 Mass. at 201-202, 466 N.E.2d at 821. Although the court stated that this Court did not rule on this precise issue in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the court concluded that a right to such review "logically follows" from this Court's opinion in *Wolff*.

However, nothing in this Court's opinion in *Wolff* serves as a logical predicate for the Supreme Judicial Court's ruling. In *Wolff*, this Court held that where an inmate has a state created right to good time, of which he can be deprived only for serious misbehavior, he is entitled, under the due process clause, to certain minimal procedural safeguards in determining whether such misbehavior has occurred. 418 U.S. at 557. Quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), the Court held, with respect to procedural requirements, that an inmate has a right to " 'a written statement by factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff* at 564. The purpose of such a requirement was stated to be: "a written record helps to insure that administrators, faced

[2] Although the Massachusetts Legislature has exempted the findings of prison disciplinary boards from substantive judicial review under the Massachusetts Administrative Procedures Act, *see* Mass. Gen. Laws c. 30A, §§ 1(2) and 1A; *Hill* v. *Superintendent*, 392 Mass. at 199 n.3, 466 N.E.2d at 820 n.3, the Supreme Judicial Court held that the proper avenue for asserting the constitutional right to review in the state court is an action in the nature of certiorari under Mass. Gen. Laws c. 249, § 4. *Hill* v. *Superintendent*, 392 Mass. at 199 n.3, 466 N.E.2d at 819 n.2.

with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." *Wolff* at 565. From this language the Supreme Judicial Court inferred that this court had created an independent constitutional right to judicial review of the sufficiency of evidence introduced in disciplinary hearings. Such an inference is not only strained, it is totally inconsistent with this Court's traditional view of the scope of judicial review in general.

Historically there is no constitutional right to judicial appellate review in criminal cases. As stated in *McKane* v. *Durston*, 153 U.S. 684, 687 (1894) "[a] review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law." See also *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). Moreover, this Court has held, consistent with due process, that administrative agencies may make final determinations of legal questions, which are not subject to judicial oversight (*Reetz* v. *Michigan*, 188 U.S. 505, 507 (1903)), noting that "[d]ue process is not necessarily judicial process." The Court also has upheld, against constitutional attack, a statute which granted final unreviewable authority to a board of penal authorities to grant parole. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902). More recently this Court reiterated that the Due Process Clause does not require the state to provide appellate review at all. *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972). Where appellate review in general is not required, it would be anomolous to suggest that the constitution required such review in the limited and highly specialized context of prison disciplinary hearings.

Wolff v. *McDonnell*, 418 U.S. 539, merely required that certain minimal procedural rights be accorded inmates at disciplinary hearings to the end that a constitutionally protected liberty interest not be arbitrarily or capriciously denied. This

Court did not create a hitherto unrecognized substantive, independent, constitutionally required right to judicial review of the factfinding body.

Moreover, the Court's passing reference to the possibility of review by a court is more consistent with review for a claim of unconstitutional deprivation by reason of arbitrary and capricious official action, (as will be discussed, *infra*), than as establishing an independent constitutional right of judicial review of the sufficiency of evidence. Indeed, the lack of formality apparently required in the written statement indicates that it was not contemplated for use in a reviewing court to establish the "legal sufficiency" of the evidence. The requisites of the statement were described in *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).[3] "To demonstrate compliance . . . the decision maker should state the reasons for his determination and indicate the evidence he relied on . . ." although such statement "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Id.* *Wolff* also grants prison administrators the discretion to exclude from their statement of evidence those items of evidence which might implicate institutional or personal safety. 418 U.S. at 565. There appears to be no requirement that the statement include a summary of all the evidence. As one court has noted, "[n]o opportunity would be provided by such a document to determine whether such informally stated findings were themselves supported by substantial evidence in the record taken as a whole." *Riner* v. *Raines*, 274 Ind. 113, 117, 409 N.E.2d 575 (1980). Moreover, *Wolff* neither affords prisoners the traditional tools for testing the strength of the evidence against them, such as the right to confrontation, cross-examination, or counsel, nor does *Wolff*

---

[3] The written statement requirement in *Wolff* derived from the requirement for such a statement in *Morrissey* v. *Brewer*, *supra*, which in turn relied upon *Goldberg* v. *Kelley*, *supra*, establishing procedural requirements in welfare termination proceedings.

afford them an unqualified right to present countervailing evidence in their defense. 418 U.S. at 566-570. *Wolff*, does not even require that formal rules of evidence be observed.

In light of the fact that this Court has allowed the required procedures to remain flexible and summary, it is hardly logical to conclude that this Court ever contemplated that a disciplinary board's substantive findings should, as a matter of constitutional law, be subject to formal and independent judicial review for "legal sufficiency of the evidence." *See Hill* v. *Superintendent*, 392 Mass. at 202. In *Wolff*, this Court was concerned that state created liberty interests not be "arbitrarily abrogated." 418 U.S. at 557. It was not concerned with the good faith discretionary acts of prison officials, made after the fundamental procedural requirements of notice and a fair hearing had been afforded.

B. *Lower Federal Court Decisions Do Not Require Review of the Sufficiency of Evidence in Disciplinary Hearings.*

The Court below cited two federal court decisions as being in accord with its ruling. Neither case stands for the proposition that there is an independent constitutional right to judicial review of the sufficiency of the evidence. Both *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982) and *Wilwording* v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975), merely reflect the proposition that a claim of an arbitrary and capricious exercise of disciplinary power which deprives an inmate of a constitutionally protected liberty interest, may present a cognizable claim in a proceeding pursuant to 42 U.S.C. § 1983. The Supreme Judicial Court, it is suggested, has failed to distinguish between what constitutes a constitutionally cognizable claim of denial of due process in a statutorily authorized proceeding pursuant to § 1983 and whether an independent constitutional right of judicial review exists. These are quite

distinct inquiries and, it is submitted, neither provides the answer for the other. The Supreme Judicial Court's reliance on *Smith* and *Wilwording* is therefore misplaced. A further separate question is whether a claim of insufficient evidence to support the disciplinary board's sanction of loss of good time credits presents a constitutionally cognizable claim pursuant to § 1983.

Clearly, where *Wolff* has mandated certain procedural rights, such as notice of charges, a hearing before an impartial board, a qualified opportunity to present witnesses and a written statement of the evidence relied upon and the reasons for the disciplinary action, violation of these procedural rights may present a cognizable claim in a § 1983 proceeding. However, if the procedural protections required by *Wolff* are provided, the only constitutionally cognizable claim is whether there was an arbitrary and capricious denial of a liberty interest. *See gen.*, *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981); *Willis* v. *Ciccone*, 506 F.2d 1011 (8th Cir. 1974). In making that determination, it is suggested, the federally required standard is whether, on examination of the written statement, "any" evidence supports the disciplinary board's findings.

The Fourth Circuit has specifically held that questions concerning the competency and sufficiency of evidence, and the credibility of the witnesses are matters beyond the scope of inquiry in a § 1983 proceeding. *Russell* v. *Division of Corrections, Commonwealth of Virginia*, 392 F.Supp. 476 (W.D. Va. 1975), *aff'd*, 530 F.2d 969 (4th Cir. 1975). In a similar vein the Seventh Circuit has recently held that an allegation that a prison guard planted false evidence which implicated the inmate in a disciplinary violation presents no cognizable claim. Once the procedural due process protections required by *Wolff* have been provided the only function of a federal court in a § 1983 action is to review the statement of evidence upon which the disciplinary committee relied to determine if

the decision is supported by some or any facts. *Hanrahan* v. *Lane*, No. 82-2892 (7th Cir. October 30, 1984). Slip Opinion at 6. See also *Willis* v. *Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974) (allegation that a disciplinary charge was based on false reports summarily dismissed where there was "any basis in fact" to support the disciplinary action). This limited right of review of disciplinary hearings in a § 1983 proceeding, where deprivations of fundamental constitutional rights are alleged, is consistent with the fundamental protection afforded by the Due Process Clause — freedom from arbitrary or capricious action. The cases however provide no support for the proposition that there is a constitutional right to review of the sufficiency of evidence upon which a prison disciplinary infraction is found. *Glick* v. *Sargent*, 696 F.2d 413, 415 (8th Cir. 1983); *Scott* v. *DeJarnette*, 470 F.Supp. 766 (E.D. Ark. 1979).

The Supreme Judicial Court has transformed the right to federal review in a § 1983 proceeding (which is limited to review for fundamental constitutional error) into an independent constitutional right to appellate-type review. The Court further erred in failing to recognize that the process that is due in the disciplinary context is simply the procedural requirements of *Wolff* which protect prisoners from "arbitrary actions extinguishing their privileges." *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1282 (1984).

Moreover, the Supreme Judicial Court has vastly expanded the scope of review by requiring an examination of the "legal sufficiency" of the evidence. Such a requirement implies that a disciplinary hearing is the equivalent of a criminal proceeding; a proposition which this Court rejected in *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976) wherein this court recognized that "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." See also, *McGinnis* v. *Stevens*, 543 P.2d 1221, 1235-1236 (Ala. 1975).

C. *Entitlement to Procedural Protections In General, Does Not Imply A Concomitant Right to Review for Sufficiency of the Evidence.*

Little can be pointed to in this Court's jurisprudence that would support the Supreme Judicial Court's assumption that due process requires not only a fair hearing, but an appellate type review of the sufficiency of the evidence at that hearing.

As noted above, there is no constitutional right to appellate review in criminal cases. Moreover, this Court has refused to extend the procedural protections required in certain administrative hearings to include appellate review.

For example, in *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (*per curiam*), welfare recipients, seeking judicial review of the sufficiency of the evidence supporting an agency determination which reduced their welfare payments, challenged on due process grounds, an Oregon court filing fee requirement which effectively precluded review of the agency determination because of their indigency. 410 U.S. at 657, nn.1 and 2; *see*, *Ortwein* v. *Schwab*, 498 P.2d 757, 760 (Ore. 1972).

This Court held that due process did not require judicial review. The pretermination evidentiary hearings which met the minimal requirements of due process as enunciated in *Goldberg* v. *Kelly*, 397 U.S. 254, 266-271 (1970) supplied all the process due. *Ortwein* at 659-660.

Again, in the context of deportation hearings, the Court specifically rejected the concept of judicial review of the legal sufficiency of evidence. In *Tisi* v. *Tod*, 264 U.S. 131 (1924), the Court was asked to consider the claim of an alien who challenged his deportation for the knowing possession with intent to distribute, certain seditious leaflets. Tisi claimed that there was no evidence to support the Secretary of Labor's finding that Tisi knew the seditious character of the material.

The Court ruled that, although the government introduced no direct evidence contrary to Tisi's testimony, the Secretary was not bound to believe Tisi, and there was other evidence from which Tisi's knowledge could have been reasonably inferred. The Court stated:

> We do not discuss the evidence, because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct, or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.
>
> The denial of a fair hearing is not established by proving merely that the decision was wrong. . . This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact, or in drawing a wrong inference from the evidence. . . [H]ere no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion, is shown.

264 U.S. at 133-134 [*citations omitted*]. Noting that the conduct of the hearing comported with all procedural requirements, the Court concluded, "[u]nder these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." 264 U.S. at 134.[4] *See also, United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 106 (1927); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957).

---

[4] It need hardly be said that the liberty interest at stake at a deportation hearing far outstrips a prisoner's interest in statutory good-time. *See, e.g., Landon* v. *Plasencia,* 459 U.S. 21, 34 (1982). *Compare, Wolff* v. *McDonnell,* 418 U.S. at 561.

Similarly this Court has limited its review of military courts-martial to jurisdictional issues and to review of "fundamental defects" rising to a constitutional level, and has left the development and application of military discipline to the executive and legislative branches. *Schlesinger* v. *Councilman*, 420 U.S. 738, 747, 758 (1975); *United States* v. *Augenblick*, 393 U.S. 348, 351-352 (1969); *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953). This Court has clearly held that review of courts-martial findings for sufficiency of the evidence is *not* a facet of its limited review for constitutional error. *Hiatt* v. *Brown*, 339 U.S. 103, 110 (1950); *Whelchel* v. *McDonald*, 340 U.S. 122, 124 (1950). "Factual determinations by a court-martial 'are not of constitutional significance' and, therefore, are beyond the scope of review by a civil court (*Levy* v. *Parker*, 478 F.2d 772, 797 (3rd Cir. 1973), *aff'd*, 417 U.S. 733 (1974)), so long as the court-martial trial was a 'disciplined contest' and not a 'spectacle' or a 'trial by ordeal' (*United States* v. *Augenblick*, 393 U.S. at 356)." *Bowling* v. *United States*, 552 F.Supp. 54, 62-63 (Ct. Cl. 1982), *aff'd*, 713 F.2d 1558 (Fed. Cir. 1983). *See Owings* v. *Secretary of United States Air Force*, 447 F.2d 1245, 1261 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 926 (1972).[5]

---

[5] The Supreme Judicial Court distinguished the case law governing review of courts-martial by noting that adequate review of a court-martial may be had within the system of military courts created by Congress. *Hill* v. *Superintendent*, 392 Mass. at 203, 466 N.E.2d at 822. However, the right to such internal review does not undercut the force of the analogy. Massachusetts Department of Correction regulations do provide for administrative appeals all the way to the Commissioner of Correction in cases involving loss of good-time. 103 Code Mass. Regs. § 430.18. Moreover, the potential deprivation of liberty as a result of disciplinary action in the military is far more weighty than that which results from prison discipline. *See, e.g., Hiatt* v. *Brown*, 339 U.S. 103 (1950) (soldier, convicted of murder by a court-martial, received a sentence including a dishonorable discharge, forfeiture of all pay and allowances, and twenty years imprisonment).

Finally, the fallacy of tying procedural safeguards to a review for the sufficiency of the evidence is made manifest upon examination of another case involving the state created liberty interests of prisoners. In *Hewitt* v. *Helms*, 459 U.S. 460 (1983), this Court found that Pennsylvania had created a liberty interest in freedom from transfer to administrative segregation. However, in light of the competing interests involved, this Court prescribed minimal procedural safeguards: notice of the reason for transfer and the opportunity for the inmate to respond, either orally or in writing. "So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." 459 U.S. at 476. It cannot be reasonably suggested, that simply because procedural safeguards were required, the Due Process Clause also compels judicial review of the legal sufficiency of the evidence on which the decisionmaker based his decision to transfer the inmate to segregation.

II. The Substantive Content of the Due Process Clause is the Protection Against Arbitrary Governmental Deprivation of Some Right.

A. *The Requisite Procedural Protections are Determined by the Specific Context of the Proceeding.*

This Court has often noted that the protection afforded by the Due Process Clause is flexible, and depends on the context in which it is applied. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). In examining that context this Court has weighed the relative interests of the individual and the state, and has balanced the potential utility of suggested due process safeguards against the potential burden such safeguards would impose on the public interest. *See Mathews*

v. *Eldridge*, 424 U.S. 319, 335 (1976); *Hewitt* v. *Helms*, 459 U.S. at 473; *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982).

In examining the relative interests of a prisoner and the state to determine the amount of protection afforded state prisoners, this Court has been cognizant of the critical need of prison officials to impose swift discipline and to insure safety within the prison, and of the special nature of the prison environment which makes these responsibilities so difficult. *See Wolff* v. *McDonnell*, 418 U.S. at 561-563; *Hewitt* v. *Helms*, 459 U.S. at 473-475; *Block* v. *Rutherford*, U.S. , 104 S.Ct. 3227, 3234-3235 (1984); *Hudson* v. *Palmer*, U.S. , 104 S.Ct. 3194, 3200-3201 (1984). This Court has emphasized that it does not intend to place the Due Process Clause "astride the day-to-day functioning of state prisons. . ." *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976).

As was noted above, analogous due process limitations are found in this Court's rulings in the area of military justice involving important policy concerns similar to those which arise in prison disciplinary matters. This Court has consistently emphasized that its scope of review of courts-martial must be tempered by consideration of the special nature and needs of the military community. The military community requires an application of constitutional protections different from those applied in the civilian courts, because of the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military. *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). These same concerns have been recognized as legitimate in the prison context. See, *Wolff* at 561-562. Because of the paramount need for regimentation enforced by strict discipline, the rules regulating military conduct cannot be held to the same standard by which civilian criminal law is judged.

> While a civilian criminal code carves out a relatively small segment of potential conduct and declares it crim-

> inal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. . . Much of the conduct proscribed by the military is not "criminal" conduct in the civilian sense of the word.

Middendorf v. *Henry*, 425 U.S. 25, 38 (1976). The same may accurately be said of prison discipline. *See* 103 Code Mass. Regs. 430.22, "Code of Offenses."

Wolff itself sets forth the primary purpose for establishing procedural safeguards at prison disciplinary hearings: to prevent the arbitrary abrogation of the state created right to good time. 418 U.S. at 557. As this Court observed, "the touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558.

B. *Substantive Due Process Review of Prison Disciplinary Board Findings Should be Limited to Errors which are So Flagrant or Manifest as to Constitute an Arbitrary Deprivation of the Prisoner's Liberty Interest.*

Where substantive rights inherent in the Constitution are at issue, this Court has stated that, absent manifest evidence that prison officials abused their authority, courts should be circumspect in exercising their authority to review the actions of prison officials. *See, e.g., Bell* v. *Wolfish*, 441 U.S. 520, 547-548 (1979); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-133 (1977). Although a prisoner's interest in statutory good time is an interest of "real substance," there is no substantive right inherent in the Constitution which guarantees good-time credit for satisfactory behavior while in prison. *Wolff* v. *McDonnell*, 418 U.S. at 557. Good-time credit is a right created by the state Legislature, and presumably, the state Legislature may withdraw the right

without its action being subject to independent judicial review under the Due Process Clause. *Cf. St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).[6] *Compare Meachum* v. *Fano*, 427 U.S. 215 (1976) (transfer of prisoner to maximum security prison in no way implicated the Due Process Clause where state had not created a right to remain in lesser security institution); and *Olim* v. *Wakinekona*, 461 U.S. 238 (1983) (same, with respect to transfer of state prisoner to out-of-state maximum security prison); with *Hewitt* v. *Helms*, 459 U.S. 460 (1983) (placement of state prisoner in administrative segregation implicated the Due Process Clause where the state had created a right to freedom from such placement absent certain findings by prison officials).

---

[6] In *St. Joseph Stock Yards*, this Court considered an appeal from the dismissal of a federal suit to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for services rendered by St. Joseph Stock Yards Co. The company claimed the rates set were unconstitutionally confiscatory. The Court noted that it is generally within the power of the Legislature to create an administrative agency and endow it with the power to make conclusive findings of fact, "provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." 298 U.S. at 51. However, when the Legislature's power is circumscribed by a substantive right inherent in the Constitution itself, such as an individual's right to property, which cannot be deprived absent due process or just compensation, the Legislature cannot create an agency to do what the Legislature itself may not. In such cases, agency action is subject to an "independent judicial judgment upon the facts," just as legislative action would be. 298 U.S. at 51-54.

In the instant case, there is no similar substantive right, inherent in the Constitution, which acts as a limit to legislative authority. The right to good-time is derived from the state, not found within the Constitution. Since the state creates and defines such rights, it can, presumably, also withdraw them, and any agency it creates to administer them should only be subject to the general limitations of due process, without also being subject to independent judicial review. In a sense, this is a distinction between those rights which are "fundamental" and therefore are protected by the Constitution, and those rights whose deprivation by the state merely implicates the Constitution because of the Constitution's general substantive limitation, embodied in the due process and equal protection clauses, on state action.

Given the limited nature of the liberty interest at stake, and given the fact that the liberty interest has no independent constitutional basis, judicial review of a disciplinary board's action resulting in curtailment of that interest should not exceed the general due process review for arbitrary government action. Furthermore, given the specialized and difficult task of imposing strict discipline and insuring security in the prison setting, and given the wide variety of behavior which is properly proscribed in prison, the reviewing court should limit its review to fundamental procedural defects, flagrant or manifest error, or willful disregard of the evidence before the board. *Cf. Schlesinger* v. *Councilman*, 420 U.S. at 747, 758 (1975); *United States* v. *Augenblick*, 393 U.S. at 351-352; *Burns* v. *Wilson*, 346 U.S. at 140; *Tisi* v. *Tod*, 264 U.S. at 133-134. Courts should not second-guess the conclusions of prison administrators, who "have a better grasp of [their] domain than [a] reviewing judge. . ." *Bell* v. *Wolfish*, 441 U.S. at 548; *see*, *Block* v. *Rutherford*, 104 S.Ct. at 3234.

In expanding prisoners' constitutional rights beyond established due process requirements, the Supreme Judicial Court has imposed potentially crushing costs upon state correction officials. It subjects every prison disciplinary proceeding, which implicates some state created liberty interest, to the possibility of independent judicial review, regardless of the fact that all procedural safeguards have been afforded and regardless of the fact that prison officials have acted in good faith.[7] It would also ignore this Court's determination in *Wolff*

---

[7] In 1980, in Massachusetts correctional institutions, 8,814 disciplinary reports were issued. Seventy-eight percent of those reports, or 6,914, were written for "major" infractions, thus triggering the requirement for full disciplinary hearings. Cronin and Scott, *Correctional Disciplinary Statistics – 1980*, Mass. Dept. Correction, Table 4, p. 12 (1983). *See* 103 Code Mass. Regs. § 430.11, requiring the institution of full disciplinary proceedings for major offenses.

that prison disciplinary proceedings should not be so "legalized" as to create a confrontational forum and would impose additional costs on prison administrations thereby detracting from other correctional goals.[8] *See e.g., Wolff* v. *McDonnell*, 418 U.S. at 569-570 (introduction of counsel into

[8] Unlike the courts, prisons are not institutions whose principal, or even major, function is dispute resolution or the dispensation of justice. Prisons in America today are charged with the responsibility of punishment, rehabilitation, education, and the provision of basic physical and psychological needs, not to mention provision of legal resources so that inmates will be assured meaningful access to the courts to vindicate a broad range of rights. *See, e.g., Rhodes* v. *Chapman*, 452 U.S. 337, 352 (1981); *Association for Reduction of Violence* v. *Hall*, 558 F.Supp. 661, 663-664 and n.1 (D. Mass. 1983), *vacated on other grounds*, 734 F.2d 63 (1st Cir. (1984); *Jones* v. *Wittenburg*, 509 F.Supp. 653, 692-694 (N.D. Ohio 1980); *Cepulonis* v. *Fair*, 732 F.2d 1 (1st Cir. 1984). *See also* Burger, *An Agenda for Crime Prevention and Correctional Reform*, 67 ABA Journal 988 (1981), and Burger, *More Warehouses, or Factories with Fences?*, 8 New Eng. J. Prison Law 111 (1982) (calling for expansion of vocational training and meaningful work opportunities for inmates as well as special training for prison personnel).

Numerous studies and comments attest to the growth of prisoner litigation in the last decade. *See, e.g.*, Widener, *Foreward: The Impact of Judicial Decision-Making*, 37 Wash. and Lee L. Rev. 373 (1980); Phillips, *Foreward: Fourth Circuit Review*, 39 Wash. and Lee L. Rev. 425, 426 (1982); *Sourcebook of Criminal Justice Statistics*, U.S. Dept. of Justice, Table 5.8, p. 469 (1982). Expansion of the role of the judiciary in prison discipline can be expected to contribute to the further proliferation of prisoner lawsuits, with obvious implications for the costs in time and resources to prison officials who must defend these suits. *See* Jacobs, *Stateville: The Penitentiary in Mass Society*, 106, 136 (1977); Bershad, *The Law and Corrections: A Management Perspective*, 4 New Eng. J. Prison Law, 49, 57, 59 (1977). Such litigation also promotes an adversarial atmosphere within the prison and exacerbates the "we-they" relationship between inmates and prison officials. Singer, *Prisoner Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade*, 44 Federal Probation 3, 7 (1980). To the extent that a Constitutional right to review for sufficiency of the evidence compels prison administrators to transform the summary proceedings envisioned in *Wolff* into more trial-type proceeding, prisons will bear the costs of establishing a legally trained, quasi-judicial bureaucracy. *See* Jacobs, *supra* at 119; Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 639 (1979).

prison disciplinary proceedings, with its concomitant increase in costs to the state and increase in the confrontational nature of the proceeding would decrease the utility of such proceedings as a means of furthering other correctional goals). *Cf. Goss* v. *Lopez*, 419 U.S. 565, 583 (1975) (imposition of even truncated trial-type procedures in the public school setting might overwhelm administrative facilities and, by diverting resources, cost more than it would save in educational effectiveness); *Parham* v. *J.R.*, 442 U.S. 584, 605-606 and nn.14 and 16 (1979) (introduction of judicial-type proceedings for voluntary admission of minors to state mental health facilities may deflect mental health professionals from their primary role of patient care, deflect financial resources from mental health care, and turn rational decisionmaking into an unmanageable enterprise).

1. There Was No Arbitrary Deprivation of a Liberty Interest.

The Supreme Judicial Court made no finding that Hill and Crawford were denied their fundamental procedural rights under the Due Process Clause, and it assumed that prison officials acted in good faith. The evidence indicated that Hill and Crawford, with a third inmate, were running together from the area within the bounded confines of the assault immediately after the assault. There was a commotion surrounding the assault which would likely have drawn the inmates' attention, yet Hill and Crawford both claimed ignorance of the incident.[9] Though the evidence was circumstantial rather than direct,

[9] The respondents' profession of ignorance, under circumstances in which they might reasonably be expected to have some knowledge and, if helpful to them, to divulge it, may properly have raised an adverse inference in the minds of the board members. *See Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 and n.3 (1976), and cases cited therein.

there was no flagrant or manifest lack of evidence which would justify a finding that the board acted to arbitrarily deprive Hill and Crawford of good time. That the state court might draw a different inference from the evidence presented does not render the disciplinary board's finding arbitrary, nor does it render the hearing fundamentally unfair.

Conclusion.

For the reason stated above the decision of the Supreme Judicial Court should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,

BARBARA A.H. SMITH,
Assistant Attorney General, Chief,
Criminal Appellate Division,
Counsel of Record

MARTIN E. LEVIN,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Addendum.

103 CMR: DEPARTMENT OF CORRECTION REGULATIONS.

430.09: Preliminary Responsibilities of the Disciplinary Officer

(1) Within two (2) weekdays after receipt of the disciplinary report, the disciplinary officer shall review the disciplinary report, make whatever investigation he deems necessary and either:

(a) Dismiss the disciplinary report,

(b) With the approval of the superintendent take no immediate action on it pending the receipt of further information, or

(c) Proceed with formal disciplinary action.

(2) If the disciplinary officer decides to proceed with formal disciplinary action he shall within the aforesaid two (2) weekdays designate the offense charged as a minor or major matter and he may revise or supplement the disciplinary report. If the charge against the inmate includes the alleged commission of a felony, the disciplinary officer shall immediately notify the superintendent so that he may refer the case to the district attorney for possible prosecution. Any case referred to the district attorney shall be handled as a major matter.

(3) In designating the offense as a minor or major matter the disciplinary officer shall consider the following factors:

(a) Threat to institution security

(b) Repetitiveness

(c) Extent of harm done

(d) Mitigating circumstances

Cases involving little or no threat to the well being of others, to property, or to the security of the institution shall ordinarily be designated as minor matters.

. . . . . .

430.13: The Disciplinary Board's General Powers

(1) The chairman of the disciplinary board shall govern the conduct of every phase of a hearing before the disciplinary board including, but not limited to, the interpretation and construction of these regulations and the conduct of all parties before the board.

(2) The members of the disciplinary board shall be impartial. An inmate may challenge the impartiality of any member of the board. The inmate shall address his objection to the chairman and shall state his reasons for believing the board member to be not impartial at the beginning of the hearing. The chairman shall remove the member challenged where the chairman determines that the inmate has stated substantial reasons to support his claim that the challenged member could not sit as an impartial member of the disciplinary board. For example, a witness to the event at issue shall not sit as a member of the disciplinary board. When a member has been removed from the disciplinary board, the superintendent or his designee shall designate a replacement as soon as practicable.

(3) The board shall not be bound by the rules of evidence observed by the courts. The chairman may admit and the board may give probative effect only to evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

(4) All parties, counsel, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. The chairman may take whatever appropriate actions are necessary to conduct a hearing when confronted with improper conduct of any participant.

(5) All findings of fact, determinations of guilt or innocence, and impositions of sanctions shall be determined by a majority vote of the board.

430.14: Fact Finding Aspects of Hearing Before Disciplinary Board

(1) Before the chairman reads the charge at a hearing regarding a disciplinary offense which has been or may be referred to the district attorney for prosecution, he shall advise the inmate that he has a right to remain silent and that anything he says during the hearing may be used against him in any subsequent criminal proceedings.

(2) At the beginning of the hearing before a disciplinary board the chairman shall read the charges to the inmate and after giving any warning required by 103 CMR 430.14(1) ask the inmate if he wishes to admit or deny the charges. If the inmate admits the charges the board may immediately consider the evidence in mitigation of guilt and the sanction.

(3) If the inmate does not admit the charges the chairman shall conduct a fact finding hearing at which the disciplinary board may consider written, oral and physical evidence. All evidence considered by the disciplinary board shall be presented in the presence of the inmate except informant information which may be presented in accordance with the provisions of 103 CMR 430.15.

(4) If the inmate requests the presence of the reporting officer in accordance with the provisions of 103 CMR 430.11 and/or 430.12, the reporting officer shall attend the hearing except when the chairman determines in writing that the reporting officer is unavailable for prolonged period of time as a result of illness or other good cause. Such written determination shall be reviewed by the superintendent prior

to the commencement of the hearing. The superintendent may approve the determination or disapprove it and require rescheduling of the hearing at a time when the reporting officer will be available. The chairman in his discretion may also require the presence of the reporting officer on his own motion.

(5) The inmate shall be allowed but shall not be compelled to make an oral statement or to present a written statement in his own defense or in mitigation of punishment.

(6) The inmate shall be allowed to question the reporting officer, to question other witnesses, to call witnesses in his defense, or to present other evidence, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's questioning of witnesses, offer of other evidence, or request to call witnesses shall include, but shall not be limited to, the following:

(a) Relevance
(b) Cumulative testimony
(c) Necessity
(d) Hazards presented by an individual case.

The chairman, in his discretion, may call witnesses on his own motion, and the chairman or the board members may question witnesses or the reporting officer on their own motion.

(7) The inmate shall be allowed to present relevant, non-cumulative documentary evidence in his defense.

. . . . . .

430.16: Deliberation and Decision by the Disciplinary Board

(1) After the close of the evidence, the disciplinary board shall meet in executive session to deliberate and determine

the guilt or innocence of the inmate. The burden of proof shall be on the proponent of the disciplinary report and the disciplinary board shall make its findings on the basis of the preponderance of the evidence.

(2) If the inmate is found guilty, the disciplinary board may impose one or more of the sanctions listed in 103 CMR 430.23. The inmate's record shall not be considered by the disciplinary board in determining the guilt or innocence of the inmate but it may be considered by the disciplinary board in deciding the appropriate sanction. The disciplinary board may also in its discretion recall the inmate after reaching a guilty finding but prior to deciding on a sanction to discuss issues related to its decision on a sanction.

430.17: Record of Disciplinary Proceedings

(1) If a guilty finding is reached the disciplinary board shall prepare a written decision containing the following:

(a) A description of the evidence relied upon by it in reaching the guilty finding;

(b) A statement of the reasons for the sanctions imposed;

(c) A notice of the right to appeal.

This written decision shall be given to the inmate within two (2) weekdays of the close of the hearing.

(2) The evidence relied upon for the guilty findings and the reasons for the sanction shall be set out in specific terms unless the hearing has involved use of informant information pursuant to 103 CMR 430.15 and such specificity would create a substantial risk of harm to the informant, another person or institutional security.

430.18: Appeal Procedures

(1) An inmate may appeal the finding and/or sanction of the disciplinary board regarding a major matter or an appeal

of a minor matter to the superintendent within five (5) days following the inmate's receipt of the disciplinary board's written decision.

(2) The superintendent as the appellate authority may sustain the finding and sanction of the disciplinary board, order a rehearing, reduce or suspend the sanction, or reverse the decision and dismiss the charges. In no event shall an appellate authority increase any sanction on an appeal from a decision of the disciplinary board. The superintendent shall ordinarily act on an appeal within two (2) weekdays of its receipt by him.

(3) Any case in which the sanction includes recommended good-time forfeiture shall be reviewed by the commissioner in accordance with M. G. L. c. 127, s. 129.

(4) The commissioner may in his discretion appoint an individual or group of individuals to serve as the appellate authority in place of the superintendent in any disciplinary case or class of cases.

. . . . . .

430.22: Code of Offenses

Disciplinary offenses shall include the following acts:

(1) Disobeying an order of, lying to, or insolence toward a staff member.

(2) Violating any departmental rule or regulation, or any other rule, regulation, or condition of an institution or community-based-program.

(3) Failure to keep one's person or one's quarters in accordance with institutional rules.

(4) Being out of place.

(5) Unexcused absence from, willful failure to properly perform or refusal to accept a work or program assignment.

(6) Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper.

(7) Tampering with or blocking any locking device, door, gate or window.

(8) Conduct which disrupts or interferes with the security or orderly running of the institution.

(9) Escape or possession of escape tools.

(10) Manufacture, possession, introduction or use of any unauthorized controlled substance, alcoholic beverage or associated paraphernalia.

(11) Misuse of authorized medication, for example the unauthorized accumulation of prescribed medication.

(12) Refusal to take a breathalizer test or to provide a urine specimen.

(13) Gambling.

(14) Participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration.

(15) Possession, manufacture or introduction of a gun, firearm, explosive, ammunition, weapon, sharpened instrument, knife or tool.

(16) Killing.

(17) Self mutilation.

(18) Fighting with, assaulting or threatening another person with any offense against his person or property.

(19) Use of obscene, abusive or threatening language, action or gesture to any inmate or staff member.

(20) Engaging in unauthorized sexual acts with others.

(21) Setting a fire.

(22) Willfully destroying or damaging state property or the property of another person.

(23) Unauthorized possession of property belonging to another person.

(24) Possession of anything, including money or currency, not authorized for retention or receipt by the inmate.

(25) Giving money or anything of value to or accepting money or anything of value from another inmate, a member of his family or his friend, without authorization.

(26) Stealing.

(27) Giving or offering any official or staff member a bribe.

(28) Giving or offering any official or staff member any item or service of value.

(29) Extortion, blackmail, protection; demanding or receiving money or anything of value in return for protection against others.

(30) Violating any law of the Commonwealth of Massachusetts or United States.

(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as commission of the offense itself.

430.23: Sanctions

(1) Minor sanctions shall include:

(a) Reprimand.

(b) Loss of privileges for a specified period of time.

(c) Room restrictions.

(d) Restitution.

(e) Extra-work duty for a specified period of time.

(2) Minor sanctions may be suspended for a specified period of time not to exceed 3 months.

(3) Major sanctions shall include:

(a) Isolation for a specified period of time not to exceed 15 days for one offense.

(b) Recommended good time forfeiture.

(c) All minor sanctions.

(4) Major sanctions may be suspended for a specified period of time not to exceed 6 months.

Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-438

In the Supreme Court of the United States

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE, PETITIONER

v.

GERALD HILL, ET AL.

ON WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether a prison disciplinary board's decision to revoke an inmate's good time credits must be based upon "some evidence" in order to comply with due process.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
A decision to revoke a prison inmate's good time credits violates due process only if it is not supported by any evidence	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Adams v. *Gunnell*, 729 F.2d 362	2
Addington v. *Texas*, 441 U.S. 418	14
Aikens v. *Lash*, 514 F.2d 372, vacated, 425 U.S. 947, modified, 547 F.2d 372	13-14
Arciniega v. *Freeman*, 404 U.S. 4	10
Bell v. *Wolfish*, 441 U.S. 520	15
Block v. *Rutherford*, No. 83-317 (July 3, 1984)	15
Cepulonis v. *Commissioner of Corrections*, 15 Mass. App. Ct. 292, 445 N.E.2d 178	9
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197	15
Goldberg v. *Kelly*, 397 U.S. 254	12
Goss v. *Lopez*, 419 U.S. 565	12
Grannis v. *Ordean*, 234 U.S. 385	12
Gregory v. *City of Chicago*, 394 U.S. 111	10
Hewitt v. *Helms*, 459 U.S. 460	13, 15
Hudson v. *Palmer*, No. 82-1630 (July 3, 1984)	15
Inglese v. *Warden, U.S. Penitentiary*, 687 F.2d 362	13, 16
Investment Annuity, Inc. v. *Blumenthal*, 609 F.2d 1, cert. denied, 446 U.S. 981	8-9
Jackson v. *Carlson*, 707 F.2d 943, cert. denied, No. 83-5235 (Oct. 3, 1983)	2, 9, 14
Jackson v. *Virginia*, 443 U.S. 307	10, 14
Johnson v. *Robison*, 415 U.S. 361	8

Cases—Continued: Page

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 12
Mathews v. *Eldridge*, 424 U.S. 319 13
Morrissey v. *Brewer*, 408 U.S. 471 13
Ng Fung Ho v. *White*, 259 U.S. 276 10
Ortwein v. *Schwab*, 410 U.S. 656 13
Parham v. *J.R.*, 442 U.S. 584 13
Rusher v. *Arnold*, 550 F.2d 896 13
Santosky v. *Kramer*, 455 U.S. 745 14
Schware v. *Board of Bar Examiners*, 353 U.S. 232 .. 10
Smith v. *Rabalais*, 659 F.2d 539, cert. denied, 455 U.S. 992 13
Thompson v. *Louisville*, 362 U.S. 199 10
Tisi v. *Todd*, 264 U.S. 131 ..... 10, 16
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103 ..... 10, 16
Vachon v. *New Hampshire*, 414 U.S. 478 10
Weinberger v. *Salfi*, 422 U.S. 749 8
Willis v. *Ciccone*, 506 F.2d 1011 ..... 2, 13
Wolff v. *McDonnell*, 418 U.S. 539 ..... *passim*
Woodby v. *INS*, 385 U.S. 276 14

Constitution, statutes, and regulation:

U.S. Const. Amend. V (Due Process Clause) 5
18 U.S.C. 4161 2
Mass. Ann. Laws ch. 249, § 4 (Law. Co-op. 1974) 9
28 C.F.R. 541.15(f) 11
103 Mass. Admin. Code (1978):
§ 430.22(18) 2
§ 430.22(19) 2
§ 430.22(31) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-438

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE, PETITIONER

v.

GERALD HILL, ET AL.

ON WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the procedural protections that must be provided to a prison inmate in connection with a decision to revoke good time credits in which the inmate has a liberty interest. These credits are accumulated by a prisoner for good behavior, and have the effect of shortening his term of confinement. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), this Court held that a prisoner can have a due process-protected liberty interest in good time credits. Under *Wolff* prison authorities must provide an inmate with notice, a hearing, and a written decision before re-

voking his good time credits. The court below relied upon *Wolff* in holding that due process also requires "judicial review of the sufficiency of the evidence" supporting a decision to revoke good time credits (Pet. App. A11). The United States has a direct interest in this issue because the statute governing federal prisoners' good time credits (18 U.S.C. 4161) has been found to create a liberty interest protected by due process. *Adams* v. *Gunnell*, 729 F.2d 362, 368 (5th Cir. 1984); *Jackson* v. *Carlson*, 707 F.2d 943, 946-947 (7th Cir. 1983), cert. denied, No. 83-5235 (Oct. 3, 1983); see also *Willis* v. *Ciccone*, 506 F.2d 1011 (8th Cir. 1974). This Court's decision, therefore, may affect disciplinary proceedings in federal penal institutions.

The United States also has a more general interest in the question we shall discuss. The government conducts a variety of administrative proceedings, and the analysis applied by the Court in this case could affect the procedural protections mandated in these other contexts.

STATEMENT

1. Respondents Gerald Hill and Joseph Crawford are inmates at the Massachusetts Correctional Institution, Walpole. Petitioner is the superintendent of that facility. In May 1982, respondents each received prison disciplinary reports charging them with assaulting another inmate (Pet. App. A5 & n.4).[1]

---

[1] Respondents were charged with violating three provisions of the applicable regulations (103 Mass. Admin. Code § 430.22(18), (19) and (31) (1978):

> (18) Fighting with, assaulting or threatening another person with any offense against his person or property.

At separate hearings for each prisoner conducted on May 11, 1982, the prison disciplinary board heard the testimony of a prison guard, Sergeant Maguire, and received his written disciplinary report. The court below summarized the report as follows (Pet. App. A6-A7):

> [O]n May 2, 1982, Maguire heard an inmate twice say loudly, "What's going on?" He saw some commotion close to the other side of a door that had a window through which he had been looking. According to the report, Maguire quickly investigated and found an inmate bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. There were only three inmates other than the victim in the area at this time, and they were jogging away. Two of them were the [respondents]. From these observations, Maguire concluded that "one or more of these inmates did assault [the victim] and apparently acted as a group as they were all jogging away from the scene together."

Respondents presented some exculpatory evidence, but the board found that respondents had committed the offenses (Pet. App. A5-A6).[2] It recommended sanctions of fifteen days in isolated confinement and the loss of one hundred days of good time credits (Pet. App. A3; Pet. 5). On May 20, 1982, petitioner

---

(19) Use of obscene, abusive, or threatening language, action or gesture to any inmate or staff member.

* * * * *

(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, making plans to commit any of the above offenses * * *.

[2] The board also found the third inmate observed by Sergeant Maguire liable for the offenses (Pet. 5).

denied respondents' appeals of the board's decision (Pet. 5-6).

2. On June 8, 1982, respondents filed complaints in Massachusetts state superior court asserting that their federal constitutional rights had been violated because the prison disciplinary board's decision was not adequately supported by the evidence before the board. They sought restoration of their good time credits and expungement of all references to the incident from their prison records. Pet. App. A2-A3. The court held that there was "no evidence constitutionally adequate to support [the board's] finding" and ordered the restoration of the good time credits (Pet. App. B8). Petitioner appealed, and the Massachusetts Supreme Judicial Court affirmed (Pet. App. A1-A19).[3]

The Supreme Judicial Court first noted that Massachusetts had created a statutory right to good time credits and that respondents therefore had a liberty interest in these credits that could not be affected without the due process guaranteed by the United States Constitution (Pet. App. A9). It then held that an inmate facing the loss of good time credits is entitled under the United States Constitution "not only to the procedural due process articulated in [*Wolff* v. *McDonnell*, 418 U.S. 539 (1974)], but to judicial review of the sufficiency of the evidence to warrant the findings of the disciplinary board as well" (Pet. App. A11). It found that this additional requirement "logically follows" from this Court's decision in *Wolff* v. *McDonnell*, *supra*, that an inmate is entitled to a hearing and statement of reasons before he can be deprived of good time credits (Pet. App.

---

[3] Petitioner had appealed the decision to the state appeals court. The Supreme Judicial Court took jurisdiction of the appeal on its own motion (Pet. App. A4-A5).

A10). The court also found that judicial review was necessary to protect inmates against "good faith" decisions of prison administrators that might not be supported by "legally adequate evidence" (Pet. App. A10-A12). It rejected petitioner's arguments that such a rule would impose increased costs upon prison administrators and undercut the goal of swift punishment for violations of prison regulations (Pet. App. A12-A14).

The court stated that the judicial review required under its decision was not "a de novo evidentiary hearing before a judge [and did not] involve judicial second guessing with respect to the credibility of witnesses or the adoption of inferences" (Pet. App. A12). However, it affirmed the trial court's conclusion that, despite Sergeant Maguire's testimony and report, the prison board's determination was not supported by any evidence. Since it found that the board's decision did not meet this standard, the Supreme Judicial Court refused to decide whether a stricter "substantial evidence" standard should govern judicial review of these determinations (Pet. App. A16-A17 & n.5).

SUMMARY OF ARGUMENT

This Court held in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), that a prison inmate is entitled under the Due Process Clause to certain procedural protections before he can be deprived of good time credits in which he has a liberty interest. The court below stated that due process requires in addition "judicial review of the sufficiency of the evidence" supporting the decision of a prison disciplinary board to revoke an inmate's good time credits (Pet. App. A11). Since state law authorized judicial review of the decisions at issue in this case, it was not necessary for the

court below to determine whether such review is constitutionally required as a matter of due process. The latter question arises only when judicial review is *not* permitted by statute. The portion of the decision below that does rest upon the United States Constitution is the finding that due process supplies a standard against which a reviewing court can measure the sufficiency of the evidence supporting the board's determination.

In other contexts, this Court has held that due process is violated when a governmental decision infringing upon a liberty interest is not based upon any evidence. The court below erred in concluding that this additional procedural requirement is justified solely on the basis of this Court's decision in *Wolff*. However, because a liberty interest is at stake and the requirement would not impose any significant administrative burden, we believe that a decision to revoke good time credits does violate due process if it is not based upon any evidence. The intimation in the decision below that some more stringent standard might apply is, however, incorrect. Such a rule could prolong, and render more complex, any judicial review of these determinations, thereby exacerbating the inmate-administration tensions inherent in the disciplinary process. In addition, it could require prison decisionmakers to produce elaborate written decisions revealing evidence that could threaten the safety of guards or of inmates that cooperate with the prison administration.

In this case, the testimony and report of the prison guard provided evidence to support the decision to revoke respondents' good time credits. Therefore, there was no violation of respondents' due process rights.

ARGUMENT

A DECISION TO REVOKE A PRISON INMATE'S GOOD TIME CREDITS VIOLATES DUE PROCESS ONLY IF IT IS NOT SUPPORTED BY ANY EVIDENCE

This case concerns the process that is due in connection with the revocation of a prison inmate's good time credits.[4] The court below held that in addition to the procedural requirements enumerated by this Court in *Wolff* v. *McDonnell*, *supra*, an inmate is constitutionally entitled to "judicial review of the sufficiency of the evidence" supporting a disciplinary board decision before he can be deprived of good time credits in which he has a liberty interest protected by due process (Pet. App. A11).

Although the decision is phrased in terms of a constitutional right to "judicial review," that issue was not before the court below, and is not before this Court, because Massachusetts law authorizes judicial review of the decisions of prison disciplinary boards. The only portion of the decision below that actually rests upon the United States Constitution is the conclusion that a reviewing court may examine the merits of the board's determination because due process requires that some minimum amount of evidence support a decision to revoke good time credits. Thus, in the view of the court below, a court reviewing a disciplinary board decision may determine whether the inmate was accorded the procedural protections required by *Wolff*, and, in addition, ascertain whether the board's decision is supported by the amount of evidence necessary to satisfy due process.

---

[4] Petitioner does not challenge the conclusion of the court below that the state statute creates a liberty interest in good time credits that is protected by due process.

This Court previously has observed that, in some situations, due process requires that "some evidence" support an administrative decision. The court below erred both by failing to analyze properly whether this additional procedural protection is an element of the process that is due in connection with the revocation of good time credits, and by indicating that some higher standard might apply to these determinations. Under this Court's decisions, the revocation of good time credits violates due process only if it is not based upon any evidence.

A. The question whether the Constitution requires judicial review of a claim arises only when the applicable statutes would otherwise bar an aggrieved party from raising his claim in court. If, as in this case, a statute authorizes judicial review, there is no need to determine whether such review is constitutionally required.

For example, in *Johnson* v. *Robison*, 415 U.S. 361 (1974), Robison challenged the constitutionality of a statute that withheld veterans' educational benefits from draftees that had received conscientious objector status. The Court held that consideration of this constitutional claim was not barred by a statute precluding judicial review of decisions of the Veterans Administration. Since the statute did not preclude Robison from asserting his claim, there was no need to determine whether judicial consideration of the issue was constitutionally required. Similarly, in *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975), the Court found such constitutional concerns inapposite because "the Social Security Act itself provide[d] jurisdiction for constitutional challenges to its provisions." See also *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d 1, 7 (D.C. Cir. 1979), cert. denied, 446 U.S. 981

(1980) (noting that "denial of all access to judicial review" might violate due process).

The Supreme Judicial Court held in the present case that, as a matter of state law, respondents could bring "civil actions in the nature of certiorari" to obtain review of the decision of the prison disciplinary board (Pet. App. A2-A3 n.2), and apparently treated respondents' claim as if it had been presented under that procedure, since petitioner did "not challenge the form of the complaints" (*ibid.*). This form of state law judicial review is designed to "correct errors in proceedings * * * [which] are not otherwise reviewable by motion or by appeal." Mass. Ann. Laws ch. 249, § 4 (Law. Co-op. 1974). An inmate can use this procedure to raise a claim that he has been deprived of good time credits in violation of his due process rights. See *Cepulonis* v. *Commissioner of Corrections*, 15 Mass. App. Ct. 292, 445 N.E.2d 178 (1983).[5] Since the state statute authorizes the state courts to consider any defects in the administrative proceeding, there is no need for this Court to determine whether the Constitution requires judicial review of prison disciplinary board decisions. Thus, the only question raised by this case is whether an inmate has a due process right to a decision supported by some amount of evidence.[6] If he has such a right under the United States Constitution, state law pro-

---

[5] Inmates in federal prisons would be able to assert any such claim in a petition for a writ of habeas corpus. See *Jackson* v. *Carlson*, 707 F.2d 943, 946 (7th Cir. 1983), cert. denied, No. 83-5235 (Oct. 3, 1983).

[6] State law apparently does not contain any such judicially-enforceable evidentiary standard. The court below noted that prison disciplinary boards are exempted from the state statute authorizing courts to determine whether an administrative decision is supported by the evidence (Pet. App. A4 n.3).

vides access to the courts in order to vindicate that right.

B. This Court previously has noted that when a government decision results in the forfeiture of an important liberty interest, due process may be violated if the decision is not supported by any evidence. See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *Tisi* v. *Todd*, 264 U.S. 131, 133-134 (1924); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); cf. *Arciniega* v. *Freeman*, 404 U.S. 4 (1971) (per curiam).[7]

The court below held that this procedural protection, at a minimum, applies to proceedings to revoke an inmate's good time credits, and indicated that the Constitution might require that such a decision be supported by a greater quantum of evidence. The court's decision is erroneous in two respects. First, although we agree that some evidence must support decisions to revoke good time credits, the justification for this conclusion set forth in the decision below is fundamentally unsound. Second, the court below erred by intimating that due process may require the application of some higher standard to these decisions.[8]

---

[7] Prior to this Court's decision in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), this standard was applied to reverse criminal convictions. *E.g.*, *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974); *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969); *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

Some courts have labeled this requirement "substantive due process," but it plainly is a procedural protection analogous to that required by *Jackson* v. *Virginia*, *supra*.

[8] This case involves the *constitutional* standard applicable on judicial review of these determinations. The initial deci-

The Supreme Judicial Court acknowledged that this Court did not hold in *Wolff* v. *McDonnell*, *supra*, that a decision to revoke an inmate's good time credits must be based upon some quantum of evidence, but the court asserted that "such an entitlement logically follows from [this Court's] holding with respect to the requirements of procedural due process" (Pet. App. A10). This Court in *Wolff* decided that a prisoner could not be deprived of good time credits in which he had a liberty interest unless the state provided the inmate with certain procedural protections: advance written notice of disciplinary charges; the opportunity, in appropriate circumstances, to call witnesses and present documentary evidence; and a written statement by the decisionmaker reciting the evidence relied upon and the reasons for the decision. 418 U.S. at 563-567. The conclusion of the court below apparently is based on its view that these protections necessarily imply the additional procedural requirement that the decision to revoke good time credits must be based upon some evidence.[9]

---

sionmaker may apply a more stringent evidentiary standard in reaching his decision. See 28 C.F.R. 541.15(f) (decisions in disciplinary cases in the federal prison system must be "in accordance with the greater weight of the evidence" and "supported by substantial evidence manifested in the record").

[9] The court below also cited this Court's observation in *Wolff* that " 'a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, *and perhaps even the courts*, where fundamental constitutional rights may have been abridged, will act fairly' " (Pet. App. A10, quoting 418 U.S. at 565 (emphasis added by the court below)). However, this passage in *Wolff* indicates only that this Court believed that judicial review of these decisions *might* be available if an inmate had been deprived

The efficacy of notice, a hearing, and a written decision in preventing arbitrary government action does not depend upon the imposition of any other procedural requirement. A hearing is the "fundamental requisite of due process of law" (*Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)) because "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)). See also *Goss* v. *Lopez*, 419 U.S. 565, 579-580 (1975). A written decision demonstrates that the decisionmaker applied the proper rules and based his determination upon the evidence before him. In addition, by creating a written record subject to future scrutiny it tends to ensure that the decisionmaker will act fairly. *Wolff* v. *McDonnell*, 418 U.S. at 565; *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). This Court has never suggested that these procedures are inherently inadequate safeguards against the arbitrary exercise of government power.

Moreover, since notice, a hearing, and a written decision are required in many situations in which the due process guarantee is implicated, a conclusion that they automatically are supplemented by a constitutional evidentiary standard could, as a practical matter, result in the application of such a standard to a wide variety of cases in which government action infringes upon a liberty or property interest. Such a result would be inappropriate where, for example,

---

of "fundamental constitutional rights." It does not support the proposition that, as a matter of due process, every prison disciplinary decision must be based upon some minimum amount of evidence.

the challenged government action affects only certain types of property interests. Cf. *Ortwein* v. *Schwab*, 410 U.S. 656, 659-660 (1973).

Finally, by basing its decision upon *Wolff*, the court below ignored the methodology that this Court consistently has applied to determine the process that is due in connection with a deprivation of liberty or property. This analysis requires the consideration of three factors: the private interest affected by the government action, the risk of erroneous deprivation of that interest, and the government's interest in both the function at issue and the administrative burdens that would result from the additional procedure. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see also *Hewitt* v. *Helms*, 459 U.S. 460, 473 (1983); *Parham* v. *J.R.*, 442 U.S. 584, 599-600 (1979); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

In the present context, because an inmate's actual liberty is at stake, and because little additional administrative burden would result, we believe that it is appropriate under this test to require that some evidence support a decision to revoke good time credits. This conclusion has been reached by virtually all of the courts of appeals that have addressed the issue. *Adams* v. *Gunnell*, 729 F.2d 362, 370 (5th Cir. 1984); *Smith* v. *Rabalais*, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); *Willis* v. *Ciccone*, 506 F.2d 1011, 1018, 1019 n.11 (8th Cir. 1974); *Inglese* v. *Warden, U.S. Penitentiary*, 687 F.2d 362, 363 (11th Cir. 1982); cf. *Rusher* v. *Arnold*, 550 F.2d 896, 899 (3d Cir. 1977).[10]

---

[10] One Seventh Circuit decision applied a "substantial evidence" standard. *Aikens* v. *Lash*, 514 F.2d 55, 60-61 (1975), vacated, 425 U.S. 947, modified, 547 F.2d 372 (7th Cir.

We believe, however, that there is no support for the suggestion by the court below that a more stringent "substantial evidence" standard might apply in this context (Pet. App. A17 n.5). First, this Court has never found such a standard applicable as a matter of due process. Although the Court held in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), that the Constitution requires proof beyond a reasonable doubt in order to uphold a criminal conviction, the rationale of that case is not applicable here. In *Wolff* v. *McDonnell*, *supra*, the Court recognized that although "[t]he deprivation of good time is unquestionably a matter of considerable importance," it does not "work any [immediate or wholly certain] change in the conditions of [the inmate's] liberty" and differs in other significant respects from a criminal conviction (418 U.S. at 561). Accordingly, the liberty interest in good time credits is of a substantially lesser magnitude than the liberty interest implicated by a criminal conviction.[11]

Second, important considerations weigh against the adoption of a more stringent standard. Prison dis-

---

1976). However, a recent Seventh Circuit opinion relies upon the decisions of the other courts of appeals and interprets this standard in a manner that appears to be close to the some evidence test. *Jackson* v. *Carlson*, 707 F.2d at 949. See also note 12, *infra*.

[11] The decisions of this Court in which a heightened burden of proof at trial was found to be constitutionally required also rest upon the conclusion that the liberty interest involved was "significant" or "fundamental." *E.g.*, *Santosky* v. *Kramer*, 455 U.S. 745, 753, 756-757 (1982); *Addington* v. *Texas*, 441 U.S. 418, 425-426 (1979). Even in these situations, however, the scope of any judicial review can be narrower than the burden of proof at the trial stage. See *Woodby* v. *INS*, 385 U.S. 276, 282 (1966).

ciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so" (*Wolff*, 418 U.S. at 561). Although some prisoners may be amenable to reform, others "may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends" (*id.* at 563). These considerations, along with the paramount goal of ensuring the safety of both guards and inmates, must be taken into account in determining whether the Constitution requires the imposition of an additional procedural requirement in this setting. *Block* v. *Rutherford*, No. 83-317 (July 3, 1984), slip op. 8-9; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 6, 9; *Hewitt* v. *Helms*, 459 U.S. at 467; *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979); *Wolff* v. *McDonnell*, 418 U.S. at 563.

An evidentiary standard more stringent than the some evidence test would most likely complicate and prolong any judicial review of disciplinary actions.[12] It therefore could enable disruptive inmates to manipulate the disciplinary system to impose additional burdens on prison authorities. Complex judicial review proceedings also would lengthen the entire disciplinary process, and increase the opportunity for conflict between the inmate, prison authorities, and

---

[12] In some circumstances, the "substantial evidence" standard may be close to the requirement of "some evidence." See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938) (substantial evidence is "evidence * * * a reasonable mind might accept as adequate to support a conclusion"). However, in the view of the court below, it would require a reviewing court to survey the entire record and weigh the evidence (Pet. App. A17 n.5). That approach obviously would result in a more complex review proceeding.

the victim or informant (see *Wolff*, 418 U.S. at 562). In addition, such a standard could subvert this Court's decision in *Wolff* that some items of evidence may be omitted from written disciplinary decisions in order to protect "personal or institutional safety" (*id.* at 565). Prison officials probably would be required to establish more comprehensive evidentiary records and write more elaborate decisions in response to the demands of reviewing courts. Such a standard of judicial review, in sum, would "very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution" (*id.* at 563). The some evidence standard, by contrast, protects inmates against arbitrary decisions while reducing the uncertainty that disciplinary sanctions will prevail, and can be applied easily by a reviewing court on the basis of the written decision already required by *Wolff*. For all of these reasons, a more stringent constitutional standard is not appropriate in this setting.

C. Under the some evidence standard, "it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. at 106; see also *Tisi* v. *Todd*, 264 U.S. at 133. The record in this case is not so devoid of evidence as to fall short of this standard. The prison guard who arrived at the scene immediately after the assault observed respondents leaving the area, which was enclosed by a fence, and saw no other inmates in the vicinity (Pet. App. A7). His testimony and report constitute "some evidence" supporting the board's inference of guilt. See *Inglese* v. *Warden, U.S. Penitentiary*, 687 F.2d at 363 (up-

holding decision based upon some evidence, "albeit meager").[13] Since this case does not present a situation in which there is no evidence underlying the revocation of good time credits, respondents' due process rights have not been violated.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

DECEMBER 1984

---

[13] The cases relied upon by the courts below (Pet. App. A18, B4-B6) concern the sufficiency of the evidence to support a criminal conviction, and therefore are not relevant in determining whether the decision was supported by any evidence.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10130

(5)

FILED

JAN 8 1985

ALEXANDER L. STEVAS, CLERK

No. 84-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,

Petitioner,

v.

GERALD HILL AND JOSEPH CRAWFORD,

Respondents.

On Writ of Certiorari to the Massachusetts Supreme Judicial Court

AMICI CURIAE BRIEF OF STATE OF CALIFORNIA ex rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL and CALIFORNIA DEPARTMENT OF CORRECTIONS; and the STATES OF ALABAMA, ARIZONA, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, VIRGINIA, WYOMING IN SUPPORT OF REVERSAL

Attorneys for Amici Curiae State of California ex rel. John K. Van De Kamp Attorney General, and California Department of Corrections

JOHN K. VAN DE KAMP
Attorney General

STEVE WHITE
Chief Assistant Attorney General

ARNOLD OVEROYE
Assistant Attorney General

WILLIAM GEORGE PRAHL
SUSAN J. ORTON
Counsel of Record
Deputy Attorneys General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5279

(continued on inside cover)

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

CHARLES A. GRADDIT
Attorney General
State of Alabama

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
State of Arizona

JOSEPH L. LIEBERMAN
Attorney General
CORNELIUS TUOHY
Assistant Attorney General
State of Connecticut

MICHAEL A. LILLY
Attorney General
State of Hawaii

NEIL HARTIGAN
Attorney General
JILL WINE-BANKS
Solicitor General
State of Illinois

LINLEY E. PEARSON
Attorney General
State of Indiana

ROBERT T. STEPHAN
Attorney General
State of Kansas

DAVID ARMSTRONG
Attorney General
Commonwealth of Kentucky

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

FRANK J. KELLEY
Attorney General
LEWIS J. CARUSO
Solicitor General
State of Michigan

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

EDWIN LLOYD PITTMAN
Attorney General
ROBERT L. GIBBS
Assistant Attorney General
State of Mississippi

JOHN ASHCROFT
Attorney General
JOHN M. MORRIS
Chief Counsel
Criminal Division
State of Missouri

MIKE GREELY
Attorney General
State of Montana

PAUL DOUGLAS
Attorney General
State of Nebraska

RUFUS L. EDMISTEN
Attorney General
State of North Carolina

ANTHONY J. CELEBREZZE, JR.
Attorney General
State of Ohio

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina

MARK V. MEIERHENRY
Attorney General
State of South Dakota

JOHN EASTON, JR.
Attorney General
State of Vermont

GERALD L. BALILES
Attorney General
Commonwealth of Virginia

A. G. MCCLINTOCK
Attorney General
State of Wyoming

QUESTIONS PRESENTED

1. Is judicial review of prison disciplinary findings compelled by the due process clause of the Fourteenth Amendment?

2. If judicial review of prison disciplinary findings is required, should such findings be reviewed under a standard more stringent than an inquiry as to whether the discipline imposed is arbitrary, capricious, or an abuse of discretion?

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i.
INTEREST OF AMICI		2
SUMMARY OF ARGUMENT		5
ARGUMENTS		
I	STATE PRISONERS' SUBSTANTIVE DUE PROCESS RIGHTS DO NOT REQUIRE JUDICIAL REVIEW OF DISCIPLINARY ACTION FINDINGS, ABSENT A SHOWING THAT POSTDEPRIVATION REMEDIES ARE INADEQUATE	6
II	JUDICIAL REVIEW OF DISCIPLINARY FINDINGS SHOULD BE LIMITED TO ERRORS WHICH ARE SO FLAGRANT OR MANIFEST AS TO CONSTITUTE AN ARBITRARY DEPRIVATION OF THE PRISONER'S LIBERTY INTEREST	14
CONCLUSION		17

TABLE OF AUTHORITIES

	Page
Hudson v. Palmer (1984) ___ U.S. ___ 104 S.Ct. 3194	6, 13
In re Jackson Crim. 24237 hearing granted, 12-13-84	12
In re Spence (1974) 36 Cal.App.3d 636	15
Kush v. Rutledge (1983) 103 S.Ct. 1483	7
Parratt v. Taylor (1981) 451 U.S. 527	6, 7
Rutledge v. Arizona Bd. of Regents (9th Cir. 1981) 660 F.2d 1345	7
Wolf-Lillie v. Sonquist (7th Cir. 1983) 699 F.2d 864	7
Wolff v. McDonnell (1974) 418 U.S. 539	2, 5, 12, 14, 15, 16

STATUTES, CODES AND OTHER AUTHORITIES

Title 15, California Administrative Code

§ 3312(e)(f)	8
§ 3314	7
§ 3315	7
§ 3323	7
§ 3325	8
§ 3328	7

	Page
California Constitution	
Article 6, section 10	12
California Penal Code	
§ 1473 et seq.	12
Illinois Rev. Statute	
Chapter 38, § 1003-3-2(a)(4)	11
Chapter 38, § 1003-6-3	11
Nebraska Rev. Statute	
§ 25-1901 et seq.	11
New Jersey Constitution	
(1947) Article VI, § V, ¶ 4	12
Ohio Administrative Code	
§ 5120-9-09	11
42 United States Code	
§ 1997e(a)(1)	13
United States Supreme Court Rules	
Rule 36.4	2

No. 84-438

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,

Petitioner,

v.

GERALD HILL AND JOSEPH CRAWFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

AMICI CURIAE BRIEF OF STATE OF CALIFORNIA ex rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL and CALIFORNIA DEPARTMENT OF CORRECTIONS; and the STATES OF

ALABAMA, ARIZONA, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, VIRGINIA, WYOMING

Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of petitioner, Superintendent, Massachusetts Correctional Institution, Walpole.

The twenty states which have joined as amici in this case manage state prisons within their respective jurisdictions. Amici are charged with the responsibility of balancing the needs of institutional security against inmates' individual rights.

Amici administer thousands of prison disciplinary hearings and appeals therefrom each year. These hearings are conducted pursuant to the procedural due process requirements established by the Court a decade ago. (Wolff v. McDonnell, 418 U.S. 539 (1974).)

This Court's grant of certiorari on the instant case represents a significant, nationwide potential for an expanded judicial role in reviewing prison disciplinary hearings. Amici wish to impress upon the Court their opposition to such an expansion. Their position, in brief, is that the existing federal and state network of procedures for reviewing prison disciplinary findings works well to assure due process and that further expansion is not necessary.

California's experience is illustrative. California's 42,976 inmates may challenge prison disciplinary actions by administrative appeals within amicus California Department of Corrections and, thereafter, in state habeas corpus actions. If substantive due process rights expand inmates' avenues of appeal directly into federal court on questions of substantive sufficiency of findings, California's

judicial and legal workload will increase exponentially without securing significant gains for inmates.

This situation is by no means unique to California and its Department of Corrections. Other amici joining in this brief have fashioned similar state procedures and litigate state and federal cases concerning state prisoners. The issues in this case are of critical importance to them, and amici therefore respectfully request that their contentions be considered in this case.

- - - - - -

SUMMARY OF ARGUMENT

The Massachusetts decision presented here creates a new substantive due process right to judicial review of prison disciplinary findings, as a "logical extension" of Wolff v. McDonnell.

Amici urge reversal of the Massachusetts decision as an unwarranted addition to existing state and federal frameworks for prison disciplinary actions.

Amici submit that the present structure offers adequate remedies to inmates who challenge disciplinary actions. Given the adequacy of those postdeprivation remedies, the due process clause does not compel judicial review of disciplinary findings. Accordingly, amici urge the Court to reverse the Massachusetts Supreme Judicial Court and halt the spread of new judicial roles of doubtful utility and uneven application.

ARGUMENTS

I

STATE PRISONERS' SUBSTANTIVE DUE PROCESS RIGHTS DO NOT REQUIRE JUDICIAL REVIEW OF DISCIPLINARY ACTION FINDINGS, ABSENT A SHOWING THAT POSTDEPRIVATION REMEDIES ARE INADEQUATE

The appropriate focus for due process analysis here is, in amici's view, the following: whether meaningful state standards and procedures can offer inmates an adequate remedy after liberty interests have been deprived by prison disciplinary actions.

Evaluation of postdeprivation remedies has been a key factor in cases involving prisoners' loss of property, whether intentional or negligent. (Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194 (1984); Parratt v. Taylor, 451 U.S. 527 (1981).) Amici submit that the adequacy of such remedies should be the pivotal factor in evaluating the liberty interest involved in

prison disciplinary actions. (See Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), aff'd on other grounds sub. nom., Kush v. Rutledge, 103 S.Ct. 1483 (1983).) [1/]

In California, for example, the disciplinary system is designed to ensure uniformity and accountability. Due process guarantees are built into the precise definitions of punishable misconduct and corresponding credit losses. (15 Cal. Admin. Code, §§ 3314-3315, 3323. [2/]) Restoration of lost credit is offered to inmates after "discipline-free" periods. (§ 3328.)

---

1. See also, Wolf-Lillie v. Sonquist, 699 F.2d 864, 871 (7th Cir. 1983) (Parratt "requires federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law").

2. All section citations refer to Title 15, California Administrative Code.

A three-level appeal system is also a central feature of the California system for prison discipline. Review of disciplinary actions begins at the institutional level, where both informal and formal appeals may be taken. (§§ 3312(e)(f), 3325.) California's experience has demonstrated that the remedy of institutional review is not a hollow one. In fiscal year 1983-84, for example, First Level or informal appeals from disciplinary actions were taken by 2,446 inmates. Relief or partial relief was granted at this level in 579, or approximately 23 percent, of those appeals. (California Department of Corrections Inmate/Parolee Appeals Quarterly Reports for F.Y. 83-84, First Level.) Second Level appeals from disciplinary actions during that same period totalled 3,175, of which 601 or approximately 18.9 percent were granted or

partially granted. (Id., Second Level Reports.)

As an additional protection, third-level review in California is carried out by a professional appeals unit which is independent of all institutional hierarchies at the prisons. 1,412 appeals were brought to this level in fiscal year 1983-84 for formal reevaluation. After investigation, interviews, and a full review for compliance with all procedural requirements, including the "preponderance of the evidence" standard of proof, appeals were granted or partially granted in 238 cases, approximately 16.8 percent. (Id., Third Level Reports.)

Postdeprivation remedies are thus demonstrably effective in California at the administrative level, where inmates with complaints about disciplinary actions can obtain post-hearing review by institutional

and then statewide appeals units with a record of fairness and objectivity.

The State of Illinois, with approximately 16,000 inmates and 102,636 disciplinary actions in fiscal year 1984, offers another example of a workable system of administrative review. Illinois, like California, has a tri-level structure for review of disciplinary actions in its prisons. After discipline has been imposed, inmates may take grievances to an Institutional Inquiry Board at the prisons.

Further appeals may be taken by personal appearance or statement to the Administrative Review Board, made up of three persons from outside the prison, one of whom must be a public member.

A third level of review is available to Illinois inmates facing a loss of more than 30 days of "good conduct credit" in twelve months. That review is before the

Prisoner Review Board, an independent agency which reports to the Governor. (Ill. Rev. Stats. Ch. 38, § 1003-6-3.) Illinois law requires that appointees to the Prisoner Review Board have at least five years' professional experience in penology or a related area. (Ill. Rev. Stats. Ch. 38, § 1003-3-2(a)(4).) (See also, Ohio Admin. Code, § 5120-9-09 which also has a tri-level system.) To superimpose a new layer of judicial review atop such adequate state-made structures is not required by the due process clause.

Moreover, many states already provide for broad equitable relief from adverse decisions of prison administrators. Petitions in Error or for Writs of Habeas Corpus offer a simple, flexible means for prisoner access to state courts. (See Cal. Pen. Code, § 1473 et seq.; Neb. Rev. Stat.

§ 25-1901 et seq. (Reissue 1979); N.J. Const. (1947) art. VI, § V, ¶ 4.)

In California, the inmate has potential recourse to all three judicial levels, since original jurisdiction is conferred in the Supreme Court and the Court of Appeal, as well as the Superior Court, for issuance of writs of habeas corpus. (Cal. Const., art. 6, § 10.)

For example, the California Supreme Court now has pending a state prisoner's habeas corpus action concerning the in camera qualification of a confidential informant to a prison disciplinary action. (In re Jackson, Crim. 24237, hg. granted, Dec. 13, 1984.) The matter had previously been heard in the trial court and was then the subject of a published Court of Appeal decision.

In summary, judicial review of prison disciplinary actions should not be required as an extension of Wolff v.

McDonnell, supra, because state-created reviews can provide adequate postdeprivation remedies. 3/

- - - - - -

---

3. While amici do not urge exhaustion, as such, as a bar to such review, the discretion to impose such a requirement, as a 90-day stay of federal actions, is already authorized by 42 United States Code section 1997e(a)(1). (See, also, Justice O'Connor's concurring opinion in Hudson v. Palmer, supra, at p. 3207.)

II

JUDICIAL REVIEW OF DISCIPLINARY FINDINGS SHOULD BE LIMITED TO ERRORS WHICH ARE SO FLAGRANT OR MANIFEST AS TO CONSTITUTE AN ARBITRARY DEPRIVATION OF THE PRISONER'S LIBERTY INTEREST

If the Court extends Wolff v. McDonnell to require judicial review of disciplinary findings, amici support Petitioner's argument that disciplinary actions should be reviewed only for fundamental procedural defects, flagrant or manifest error, or unjustified disregard of the evidence before the disciplinary board. Amici submit that a more stringent national standard will hamper prison administrators without adding significant protections for inmates.

In Wolff v. McDonnell, the Court noted that the dynamics of fact-finding in prison discipline cases are unlike those of

an open society. (Wolff v. McDonnell, supra, 418 U.S. at pp. 558-572.) In a prison disciplinary setting, immediate concerns for survival are paramount. Motives and ulterior motives for cooperation or non-cooperation cross-mingle in an atmosphere of tension and self-preservation. Prison officials responsible for punishing misconduct are faced with razor-thin judgment calls which must insure the safety of inmates and staff. In this environment, fact-finding must be fair at a very fundamental level, or the basic goal of maintaining prison calm is lost, among others. The standard urged by petitioner will, amici submit, ensure such fairness. As noted in Wolff, "the touchstone of due process is protection of the individual against arbitrary action of government." (Wolff v. McDonnell, supra, 418 U.S. at p. 558; see also In Re Spence, 36 Cal.App.3d 636, 639-640 (1974).) Accordingly,

amici urge the Court to adopt petitioner's standard if the Court does find judicial review required as a corollary to Wolff.

- - - - - -

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Massachusetts Supreme Judicial Court presented here should be reversed.

DATED: December 28, 1984

JOHN K. VAN DE KAMP
Attorney General
STEVE WHITE, Chief
Assistant Attorney General
ARNOLD OVEROYE
Assistant Attorney General
WILLIAM GEORGE PRAHL
Supervising Deputy Attorney General

SUSAN J. ORTON
Counsel of Record
Deputies Attorney General

Attorneys for Amici Curiae
State of California ex. rel.
John K. Van De Kamp, Attorney
General, and California
Department of Corrections

Charles A. Graddit
Attorney General
State of Alabama

Joseph L. Lieberman
Attorney General
Cornelius Tuohy
Assistant Attorney General
State of Connecticut

Michael A. Lilly
Attorney General
State of Hawaii

Neil Hartigan
Attorney General
Jill Wine-Banks
Solicitor General
State of Illinois

Linley E. Pearson
Attorney General
State of Indiana

Robert T. Stephan
Attorney General
State of Kansas

David Armstrong
Attorney General
Commonwealth of Kentucky

William J. Guste, Jr.
Attorney General
State of Louisiana

Hubert H. Humphrey, III
Attorney General
State of Minnesota

Edwin Lloyd Pittman
Attorney General
Robert L. Gibbs
Assistant Attorney General
State of Mississippi

John Ashcroft
Attorney General
John M. Morris
Chief Counsel
Criminal Division
State of Missouri

Mike Greely
Attorney General
State of Montana

Paul Douglas
Attorney General
State of Nebraska

Rufus L. Edmisten
Attorney General
State of North Carolina

Anthony J. Celebrezze, Jr.
Attorney General
State of Ohio

T. Travis Medlock
Attorney General
State of South Carolina

Mark V. Meierhenry
Attorney General
State of South Dakota

John Easton, Jr.
Attorney General
State of Vermont

A. G. McClintock
Attorney General
State of Wyoming

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
State of Arizona

FRANK J. KELLEY
Attorney General
LEWIS J. CARUSO
Solicitor General
State of Michigan

GERALD L. BALILES
Attorney General
Commonwealth of Virginia

Office - Supreme Court, U.S.
FILED
FEB 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
Petitioner,

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents.

On Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF OF RESPONDENTS

JAMIE ANN SABINO
KLIBANER & SABINO*
402 Washington Street
Wellesley, MA 02181
(617) 237-7602
Counsel of Record

RICHARD B. KLIBANER
KLIBANER & SABINO*
402 Washington Street
Wellesley, MA 02181
(617) 237-7602
On the Brief

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. IN *HILL* v. *SUPERINTENDENT, M.C.I. WALPOLE*, THE MASSACHUSETTS SUPREME COURT ADDRESSED A PRISON INMATE'S RIGHT TO A DISCIPLINARY FINDING BASED UPON SUFFICIENT EVIDENCE BUT DID NOT RULE ON THE EXISTENCE OF A CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW	4
II. A PRISON INMATE HAS A RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT NOT TO BE DEPRIVED OF EARNED GOOD TIME FOR COMMITTING A DISCIPLINARY OFFENSE UNLESS THERE IS SOME EVIDENCE THAT HE COMMITTED THE OFFENSE	7
A. An Arbitrary Or Capricous Deprivation Of A Liberty Interest Violates The Constitution	7
B. In *Wolff* v. *McDonald* The Supreme Court Recognized The Requirement Of Sufficient Evidence Before There Can Be A Depriviation Of A Liberty Interest	12
C. This Is Not An Appropriate Case In Which To Decide The Level Of Evidence Needed To Support A Disciplinary Board's Findings As The Massachusetts Supreme Judicial Court Did Not Rule On This Question	15
III. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE BOARD DID NOT RECEIVE SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT AND A DEPRIVIATION OF GOOD TIME CREDITS	18
IV. THE UNITED STATES CONSTITUTION GUARANTEES A RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS	21
CONCLUSION	27
APPENDIX	
Mass. Gen. Laws c. 127, § 129	1a
Mass. Gen. Laws c. 249, § 4	4a

Table of Contents Continued

Page

Code of Mass. Regs 430.08-430.09 ..... 5a
Code of Mass. Regs 430.10 ..... 6a
Code of Mass. Regs 430.11, 430.16 ..... 7a
Code of Mass. Regs 430.23 ..... 8a

TABLE OF AUTHORITIES

CASES: Page

Adargo v. *Barr*, 482 F.Supp. 283 (D.Colo. 1980) 17

Aikens v. *Lash*, 514 F.2d 55 (7th Cir. 1975) *vacated and remanded on other grounds*, 425 U.S. 947 (1976), *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976) 7, 13

Baxter v. *Palmigiano*, 425 U.S. 308 (1976) 19

Blaney v. *Commissioner of Correction*, 374 Mass. 337 (1978) 10

Bono v. *Saxbe*, 450 F.Supp. 934 (E.D. Ill. 1978), *aff'd in part and recommended in part*, *Bono* v. *Saxbe* (7th Cir. 1980) 17

Boyd v. *Oregon State Penn., Corrections Division*, 29 Or. App. 71 (1977) 20

Broddie v. *Connecticut*, 401 U.S. 371 (1971) 23

Bryant v. *Department of Public Safety and Correctional Services*, 33 Md. App. 357 (1976) 8

Burns v. *Wilson*, 346 U.S. 137 (1953) 26

Calloway v. *Fauver*, 544 F.Supp. 584 (D.N.J. 1982) .. 15

Cepulonis v. *Commissioner of Correction*, 15 Mass. App. Ct. 292 (1983) 5

Chavis v. *Rowe*, 643 F.2d 1281 (7th Cir. 1981), *cert denied*, 454 U.S. 907 (1981) 7, 15

Commonwealth v. *Amado*, 387 Mass. 179 (1982) 18

Commonwealth v. *Toney*, 385 Mass. 575 (1982) 18

Consolidation Coal Company v. *Gooding*, 703 F.2d 230 (6th Cir. 1983) 8

Dreyer v. *Illinois*, 187 U.S. 71 (1902) 23

Duckett v. *Ward*, 458 F.Supp. 624 (S.D.N.Y. 1978) ... 17

Finney v. *Mabry*, 455 F.Supp. 756 (E.D.Ark. 1978) 7, 15, 16, 20

Four Unnamed Plaintiffs v. *Hall*, 424 F.Supp. 357 (D.Mass. 1976) 17

Franklin v. *Israel*, 537 F.Supp. 1112 (W.D. Wis. 1982) 15

Gomes v. *Travisono*, 510 F.2d 537 (1st Cir. 1974) 14

Table of Authorities Continued

Page

Grundler v. *North Carolina*, 283 F.2d 798 (4th Cir. 1960) 25

Hanrahan v. *Lane*, 747 F.2d 1137 (7th Cir. 1984) 7

Hiatt v. *Brown*, 339 U.S. 103 (1950) 26

In re Patten, 5 Mass. App. 897 (1977) 9

Inglese v. *Warden, U.S. Penitentiary*, 687 F.2d 362 (11th Cir. 1982) 15

Kenney v. *Commissioner of Correction*, 393 Mass. 28 (1984) 17

Kritsky v. *McGinnis*, 313 F.Supp. 1247 (N.D.N.Y. 1979), *aff'd sub nom.*, *Rodriguez* v. *McGinnis*, 456 F.2d 79 (2nd Cir. 1972), *rev'd on other grounds sub nom.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1975) 7

Kyle v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982) 14

Johnson v. *Robison*, 415 U.S. 361 (1974) 21

Lamoureux v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 409 (1983) . 9

McKinnon v. *Patterson*, 425 F. Supp. 383 (S.D.N.Y. 1976) 17

Mizerak v. *Adams*, 682 F.2d 374 (2d Cir. 1982) 8

Motor Vehicle Manufacturers Association of the United States v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) 8

Nelson v. *Commissioner of Correction*, 390 Mass. 379 (1983) 4

Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 8, 21, 22

Nolan v. *Scafati*, 306 F.Supp. 1 (D.Mass. 1969), *vacated on other grounds*, 430 F.2d 548 (1st Cir. 1970) ... 7, 15

Ortwein v. *Schwab*, 410 U.S. 656 (1973) 23

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 6, 7

Recording Industry Association v. *Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981) 8

Reetz v. *Michigan*, 188 U.S. 507 (1903) 22, 23

Ruiz v. *Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980) ... 10

Table of Authorities Continued

Page

Rusk v. *Cort*, 369 U.S. 367 (1962) 21, 26

Russell v. *Division of Corrections, Commonwealth of Virginia*, 392 F.Supp. 476 (W.D. Va. 1975), *aff'd without opinion*, 530 F.2d 969 (4th Cir. 1975) 25

Rutherford v. *Pitchess*, 457 F.Supp. 104 (C.D.Cal. 1978) 10

St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38 (1936) 21, 22

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 8, 17, 18, 24, 25

Smith v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982) 6, 7, 15, 16

State ex rel. Meeks v. *Gagnon*, 95 Wis.2d 115 (Ct. App. 1980) 8

Tisi v. *Todd*, 264 U.S. 131 (1924) 8, 23, 24

Toussaint v. *Rushen*, 553 F.Supp. 1365 (N.D. Cal. 1983) 17

United States ex rel. Speller v. *Lane*, 509 F.Supp. 796 (S.D.Ill. 1981) 7

United States ex rel Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103 (1927) 8, 14, 24

Walker v. *Hughes*, 558 F.2d 1247 (6th Cir. 1977) 17

Washington v. *State*, 405 So.2d 62 (Ala. Crim. Ct. App. 1981) 8, 15

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 22

Whelchel v. *McDonald*, 340 U.S. 122 (1950) 26

Wilwording v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975) 6, 7, 16

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 2, 9, 10, 12, 13, 14

REGULATIONS:

103 Code of Mass. Regs. 430.08-11 ..... 9, 10

103 Code of Mass. Regs. 430.16 17

103 Code of Mass. Regs. 430.23 ..... 4, 9

Table of Authorities Continued

Page

STATUTES:

42 U.S.C. § 1983 6

Mass. Gen. Laws c. 127, § 129 ..... 4, 8, 9

Mass. Gen. Laws c. 249, § 4 ..... 2, 5

MISCELLANEOUS:

11 Massachusetts Lawyers Weekly 353 (December 13, 1982) 11

STATEMENT OF FACTS

On May 2, 1982, Respondents Hill and Crawford, inmates at M.C.I., Walpole, each received a prison disciplinary report. They were each charged with "fighting," "threatening language or [g]esture" and "aiding another person to commit an [offense]."

At the separate disciplinary hearings held for Hill and Crawford on May 11, 1982, the disciplinary board had before it the reporting officer's written report of the incident and his oral testimony. Taken together, this evidence revealed that the reporting officer heard a "commotion," went outside to check on what was going on, found inmate Peter Stephens bleeding from his mouth and suffering from a swollen eye in an area where dirt was "strewn." J.A. 17a, 18a, 19a, 20a, 25a, 26a, 27a. The reporting officer did not see an assault. J.A. 19a. (He was later told by a "medic" that Stephens had been beaten. J.A. 19a.) The reporting officer saw the three inmates in the area jogging away. According to the reporting officer, Hill and Crawford were each among the three inmates. J.A. 17a, 18a, 19a, 20a, 25a, 26a, 27a.

During Hill's hearing the board also received Hill's plea of not guilty and his testimony that "he knows nothing about it" as well as an affidavit prepared by Stephens stating that "Gerald Hill had nothing to do with my present injuries." J.A. 19a, 21a.

During Crawford's hearing, the board also heard Crawford's plea of not guilty and his statement that "he does not know what happened, Stevens (sic) wrote an affidavit stating his innocence. His body was checked for signs of a scuffle, nothing was found." J.A. 27a.

After hearing the evidence in each case, the disciplinary board recommended that Hill and Crawford each lose

100 days good time and be confined in isolation for 15 days. J.A. 19a, 27a.

Both Hill and Crawford appealed the board's action to the superintendent of the prison, unsuccessfully J.A. 23a, 30a.

SUMMARY OF THE ARGUMENT

I. The Massachusetts Supreme Judicial Court held that prison inmates have the constitutional right not to be deprived of good time credits by a prison disciplinary board finding that is not based upon sufficient evidence. The vehicle for the judicial review of this particular administrative decision was Mass. Gen. Laws c. 249, § 4, which permits such review by an action in the nature of certiorari. The issue of an independent right to constitutional review is, therefore, not before this court.

II. Under the due process clause of the Fourteenth Amendment there is a right not to be deprived of a liberty interest by an arbitrary or capricious administrative action. In the context of a prison disciplinary hearing this means that there must be some evidence to support a guilty finding that results in the loss of good time credits. This entitlement logically follows from this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) which sets up the mechanism for such review and which guarantees protection from arbitrary actions by prison disciplinary boards.

Such a review for some evidence is also appropriate in light of the serious liberty interest involved in a loss of good time credits which can result in substantially extended incarceration. The burden such review places on the state is relatively minor in view of the current requirements under *Wolff* and the Department of Correction's own regulations. Nor would the legitimate correc-

tional goal of swift and sure discipline be undercut. Good time deprivations do not affect swift discipline. The protection of good time credits from arbitrary action enhances their ability to encourage good conduct.

The Supreme Judicial Court did not choose to rule on whether the standard for legally sufficient evidence should be "substantial evidence" or the more lenient "some evidence" test. The Court below concluded that the Board's findings failed to meet even the "some evidence" test. This is, therefore, an inappropriate case for this Court to use to resolve conflicts among other courts as to the appropriate standard. Nor did the Supreme Judicial Court use a more stringent standard than the "some evidence" rule as the words "legal sufficiency" only describe the reason for review—to find the legal sufficiency of the evidence—not the standard to be used in determining that sufficiency.

III. The Supreme Judicial Court was correct in finding that there was insufficient evidence to support a finding of guilt and a deprivation of good time credits. Evidence that three people were seen leaving a place where an assault may have occurred and the statements by two of those people that they did not know what had occurred is insufficient to find that all three persons were involved in the supposed fight.

IV. Although the issue is not raised in the instant case, the United States Constitution does guarantee a right to judicial review of administrative decisions which deprive a person of a liberty interest, as this Court has previously held.

ARGUMENT

I. IN *HILL* v. *SUPERINTENDENT, M.C.I. WALPOLE*, THE MASSACHUSETTS SUPREME COURT ADDRESSED A PRISON INMATE'S RIGHT TO A DISCIPLINARY FINDING BASED UPON SUFFICIENT EVIDENCE BUT DID NOT RULE ON THE EXISTENCE OF A CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW.

Under Massachusetts law, most inmates held in prison earn good time credits during their imprisonment. These credits range from two and one-half to twelve and one-half days for each month served, depending upon the length of the prisoner's sentence. M.G.L. c. 127, § 129. As they are earned, these credits reduce the length of the inmate's maximum sentence so that each day of "good time" reduces by one day the maximum period the inmate may be held. Good time credit earned by an inmate creates a liberty interest of which he may not be deprived without due process of law. *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 389 (1983).

The loss of good time credit previously earned is one of the punishments which an inmate may suffer if he is found by a prison disciplinary board to have violated a prison rule. There is no limit to the amount of earned good time which may be taken from a prisoner for a disciplinary infraction. 103 Code of Mass.Reg. 430.23.

In *Hill* v. *Superintendent, M.C.I., Walpole*, 392 Mass. 198 (1984), the Massachusetts Supreme Judicial Court held that an inmate may bring a civil action in the Superior Court challenging the forfeiture of good time credits on the ground that there was not sufficient evidence to support the disciplinary board's finding of guilt. The standard of review approved and used by both the trial court and the Supreme Judicial Court is whether there

was some evidence which could support the disciplinary board's finding. Cert. Pet. App. A 16-17; Cert. Pet. App. B 3.

As noted by the Solicitor General in his *amicus curiae* brief filed in this case, although the Supreme Judicial Court at some points phrased its decision in terms of a constitutional right to "judicial review" of the decision of a prison disciplinary board, that issue was not actually decided by the Court. In fact, the Court allowed review of the administrative decision revoking the respondent's good time by means of an action brought under Mass. Gen. Laws C. 249, § 4, a statute which specifically allows a petitioner "to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of . . . was as a matter of law insufficient to warrant such action." This method of review had previously been approved in *Cepulonis* v. *Commissioner of Correction*, 15 Mass. App. Ct. 292 (1983). "The only portion of the decision below which actually rests upon the United States Constitution is that a reviewing court may examine the merits of the board's determination because due process requires that some minimum amount of evidence support a decision to revoke good time credits." Solicitor General's Br. 7.

Nevertheless, the Petitioner attempts to argue that the Supreme Judicial Court has raised an independent constitutional right of judicial review. Pet's Br. 7. In doing so, the Petitioner has confused the constitutional right at stake, not to be deprived of good time credits without sufficient evidence, with the vehicle by which an inmate takes this issue to court. As stated above, in *Hill* that vehicle was a petition under Mass. Gen. Laws c. 249, § 4.

Because the Petitioner misapprehends the import of *Hill*, he mistakenly takes the Supreme Judicial Court to task for relying upon *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981), *cert. den.* 455 U.S. 992 (1982) and *Wilwording* v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. den.*, 402 U.S. 912 (1975). Pet's Br. 9-10. In neither case is the question of an "independent" constitutional review raised. However, both cases do stand for the proposition that the deprivation of good time credits in a disciplinary hearing without sufficient evidence creates a claim for deprivation of a constitutional right. This, of course, is the very holding of the Supreme Judicial Court in *Hill*.

The Petitioner also incorrectly describes *Smith* and *Wilwording* as cases arising under 42 U.S.C. § 1983. *Smith* was brought under both § 1983 and as a *habeas corpus* action. *Wilwording* was treated solely as petition for a writ of *habeas corpus* and, in fact, relies on this Court's ruling in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) which held that a writ of *habeas corpus*, not an action under § 1983, is the correct method of challenging a loss of good time credits.

As noted, this Court does not today face the question of whether there is a constitutional right to judicial review of an administrative decision which deprives a person of his or her liberty. However, in light of the Petitioner's suggestion that no such right exists, Pet's Br. 5-9, the Respondents feel that it is appropriate to briefly examine the Court's prior treatment of this question and have done so below in Section IV of this brief.

II. A PRISON INMATE HAS A RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT NOT TO BE DEPRIVED OF EARNED GOOD TIME FOR COMMITTING A DISCIPLINARY OFFENSE UNLESS THERE IS SOME EVIDENCE THAT HE COMMITTED THE OFFENSE.

A. An Arbitrary Or Capricious Deprivation Of A Liberty Interest Violates The Constitution.

All parties to this case agree that there is a constitutionally cognizable claim if there has been an arbitrary or capricious denial of a liberty interest. Pet's Br. 10, 19; see also Solicitor General's Br. 13. All the Supreme Judicial Court has done by requiring that there be some evidence to support a disciplinary board's finding has been to recognize that right. Certainly a finding which is not supported by some evidence is arbitrary and capricious. The majority of the courts that have reviewed prison disciplinary actions for some supporting evidence have framed their analysis in terms of arbitrariness. *Hanrahan* v. *Lane*, 747 F.2d 1137, 1140 (7th Cir. 1984); *Smith* v. *Rabalais*, 659 F.2d 539, 545, n.18 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982); *Chavis* v. *Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981) *cert. denied*, 454 U.S. 907 (1981); *Aikens* v. *Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947 (1976), *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976); *Wilwording* v. *Swenson*, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *Finney* v. *Mabry*, 455 F.Supp. 756, 770 (E.D. Ark. 1978); *United States ex rel. Speller* v. *Lane*, 509 F.Supp. 796, 800 (S.D. Ill. 1981); *Kritsky* v. *McGinnis*, 313 F.Supp. 1247, 1250 (N.D.N.Y. 1970), *aff'd sub nom.*, *Rodriguez* v. *McGinnis*, 456 F.2d 79 (2nd Cir. 1972), *rev'd on other grounds sub nom.*, *Presier* v. *Rodriguez*, 411 U.S. 475 (1973) (citing *Nolan* v. *Scafati*, 306 F.Supp. 1, 3 (D. Mass. 1969)

vacated on other grounds 430 F.2d 548 (1st Cir. 1970)); *Washington* v. *State*, 405 So.2d 62, 64 (Ala. Crim. Ct. App. 1981); *State ex rel. Meeks* v. *Gagnon*, 95 Wis. 2d 115 (Ct. App. 1980); see also *Bryant* v. *Department of Public Safety and Correctional Services*, 33 Md. App. 357 (1976).

It should also be noted that in reviews of other administrative decisions the arbitrary and capricious standard has included examining the factual support for the questioned decision. *Consolidation Coal Company* v. *Gooding*, 703 F.2d 230, 233 (6th Cir. 1983); *Mizerak* v. *Adams*, 682 F.2d 374, 367-377 (2d Cir. 1982); *Recording Industry Association* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 7-8 (D.C. Cir. 1981); see also *Motor Vehicle Manufacturers Association of the United States* v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

This Court itself has noted that when a government decision results in forfeiture of an important liberty interest, due process is violated if the decision is not supported by any evidence. See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *Tisi* v. *Todd*, 264 U.S. 131, 133-134 (1924); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922).

A prison disciplinary hearing which leads to the deprivation of good time is particularly the type of administration decision which cannot be arbitrary or capricious and which must be supported by some evidence.

The liberty interest in good time credits is established statutorily by the right to receive such credits. Mass. Gen. Laws Ch. 127, § 129 *et seq.* The Department of Correction's regulations establish that the loss of good time is a major sanction and can only be recommended in

instances where the offense charged has been deemed a major one. 103 Code of Mass. Reg. 430.08-11, 430.23. The disciplinary board in fact only recommends the forfeiture of good time, as the loss is considered serious enough to require the approval of the commissioner. Mass. Gen. Laws Ch. 127, § 129. (The hearing and determination of the board, however, is the crucial factor in the loss of the good time as there must be a recommendation of the board based on a finding of guilt before the forfeiture can be approved.) "The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance." *Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974). The fact that *Wolff* did not find it as grevious a loss or of the same stature as a parole or probation revocation or a criminal trial does not diminish the importance of the interest or the seriousness of the loss as compared to other possible sanctions. Although it does not immediately work a change in the conditions of liberty, it does make a change in the sentence of the inmate at the time of the forfeiture. His or her sentence had been reduced at that point through the earned good time and is now increased. The number of days that can be lost is limited only by the number of days earned by the inmate at the time of the hearing. *In re Patten*, 5 Mass. App. 897 (1977). A person can lose hundreds of days of good time credits resulting in an additional incarceration of several years. *Lamoureux* v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 409 (1983) (Board imposed a forfeiture of 700 days of good time credit).

On the other hand, the burden on the state of a judicial review for sufficient evidence is relatively slight. The Department of Correction's regulations already provide

for a formal hearing in major matters. This procedure differs from the informal procedure for minor offenses. 103 Code of Mass. Reg. 430.08-10. The Respondents only ask that the Department live up to its own regulations, something it is constitutionally required to do. See section II, c. *infra*. The needed record is no more than what *Wolff* already requires. It asks no more than what is required for the administrative appeals that are already provided for by regulation and statute. It is hard to imagine how the Commissioner of Correction could make the review required of him on records that are said to be inadequate for a court to review for sufficiency of evidence to support the decision.

The Petitioner's assertion that review is precluded because informant information may, under *Wolff*, be excluded from the disciplinary board's statement of the evidence is also illusory. A record of such information may easily be preserved for future review without giving the inmate access to it.

The Defendant also argues that there would be a cost to the Department and to the courts in increased litigation. Again, this would not be great as review for sufficient evidence would not require *de novo* hearings but rather reviews properly limited and similar to those of other administrative actions. This is a small cost to pay to protect a person's right not to be denied due process and not to arbitrarily lose hard-earned good time credits. It is well settled that constitutional protections cannot be denied for budgetary reasons. *Blaney* v. *Commissioner of Correction*, 374 Mass. 337 (1978). *Ruiz* v. *Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980); *Rutherford* v. *Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978). In fact, the Massachusetts trial courts have already taken steps to expeditously process prisoner cases and to ease the administrative

burden of having to transport prisoners and others to court by holding periodic sessions at M.C.I. Walpole, the state's only maximum security prison (which is located adjacent to both a large medium security prison and a minimum security facility). 11 Massachusetts Lawyers Weekly 353, 376 (Dec. 13, 1982).

The Petitioner also presumes to argue that, as the budgetary restrictions might affect the day to day life of the inmates, it would be better for them not to have such a substantive due process review. Pet's Br. 20. This ignores the great desire on the part of inmates not to lose hard-earned good time credits, particularly for no reason or with no basis in evidence. The Petitioner then goes on to express concern that litigation promotes an adversarial atmosphere within a prison and exacerbates a we-they relationship between inmates and prison officials. Pet's Br. 20 n.8. It is hard to see how allowing prison officials to act arbitrarily and to impose the loss of good time credits for no reason or with no basis in evidence will promote good-will in our prison system.

Nor would judicial review for sufficient evidence undercut the legitimate correctional goal of sure and swift discipline for misconduct. Pet's Br. 16. As the Supreme Judicial Court pointed out, the "forfeiture of good time credits does not ordinarily result in swift punishment because its impact is not felt by the inmate until, but for the forfeiture, his period of incarceration would be at an end." Cert. Pet. App. A. 14. As the forfeiture of good time does not result in a swift punishment, judicial review could not hinder such a goal. Of course, unwarranted punishment is not a legitimate correctional goal. Finally, as the goal of the good time credits themselves is to create incentives for obeying rules and good conduct, a halt to arbitrary forfeitures would likely enhance prison security

and operations. It is hard to expect a person to strive for credits that might be taken from him or her arbitrarily. Good conduct is not encouraged when a disciplinary system is a charade.

Nor would such a review place the courts in the position of second guessing the conclusions of administrators who have a better grasp of their domain. The Respondents do not seek a review of the validity of rules or credibility of evidence but a review as to whether the facts found constitute sufficient evidence for the board's conclusion that a rule has been violated. This is a function that is reserved in many cases for our courts. It is in fact an important task of our courts in criminal matters. It is surely not contended that the FCC, the Department of Health and Human Services, the Massachusetts Commissioner of Insurance or any number of agencies or public persons are not expert in their own domains. Yet their actions are reviewed by the courts. Such review is a task that our society allocates to our judges.

B. In *Wolff* v. *McDonnell* The Supreme Court Recognized The Requirement Of Sufficient Evidence Before There Can Be A Deprivation Of A Liberty Interest.

The Supreme Judicial Court found that the requirement for sufficient evidence logically follows from this Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). Although *Wolff* sets forth a comprehensive list of the procedural requisites that must be provided in prison disciplinary hearings, it does not review, discuss, mention or in any way refer to a limitation of the further due process right not to be found guilty except by the appropriate quantum of evidence. *Wolff* was brought to inquire into and redress faults in the procedural aspects of the Nebraska disciplinary hearings. Although this Court did

not go beyond the issues presented in *Wolff* and make rulings on substantive review in any individual case;

> such an entitlement logically follows from the court's holding with respect to the requirements of procedural due process, together with its reasoning that 'a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, *and perhaps even the courts*, where fundamental constitutional rights may have been abridged, will act fairly' (emphasis added). *Wolff* v. *McDonnell*, *supra* at 565.

Hill, Cert. Pet. App. A 10. This Court has specifically held "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff*, 418 U.S. at 564. This was required even though the Nebraska system did not have a system of administrative appeals. Such a written statement and acknowledgement that the courts might be involved is a clear indication that courts would be examining the statement for sufficiency of evidence. It begs the question to argue that only procedural rights are required and that once they are given there can be no abridgement of constitutional rights. It also misconstrues what this Court requires to be reported in such a written statement. This Court did not state that there must be a written report by the factfinders as to the procedures followed at the hearing. This Court did not state that there must be a written report as to when and how the inmate received notice of the hearing or the factors that show the hearing was an impartial one. The requirement is that the written statement must show the evidence relied upon and the reasons for the action. A review would be directed to that evidence and those reasons. As stated in *Aikens* v. *Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947

(1976), *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976):

> As a practical matter, we fail to see the conflict defendants note between the term "substantial evidence" and the phrase "evidence relied on and reasons for the disciplinary action." Presumably, the Supreme Court did not contemplate in *Wolff*, where its use of the latter phrase in connection with the array of procedural rights provided was directed at protecting prisoners from subsequent collateral consequences, that these rights should be easily emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by an appropriate quantum of evidence. *See e.g.*, *Gomes* v. *Travisono*, 510 F.2d 537, 549 (1st Cir. 1974); *Wilwording* v. *Swenson*, 502 F.2d 844, 851 (8th Cir. 1974).

Preventing arbitrary determinations is the "touchstone of due process" *Wolff*, 418 U.S. at 558, and the main thrust of this Court's decision in *Wolff*. *Wolff* intends a genuine hearing and not a charade. *Kyle* v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982). If a board can find people guilty with insufficient evidence, disciplinary hearings are that charade.

The Solicitor General expresses a concern that this reading of *Wolff* would widen the application of review for sufficient evidence to a wide variety of cases in which government action infringes upon property interests. Solicitor General's Br. 12. This concern is misplaced because in the instant case the only issue presented to the Court is the requirement for due process where a liberty interest is involved. What is involved is not a property interest but the interest in being free from incarceration. This Court has never held that incarceration can occur without the right to judicial review for a due process violation of insufficient evidence. Cf. *United States ex rel.*

Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927). (Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.)

C. This Is Not An Appropriate Case In Which To Decide The Level Of Evidence Needed To Support A Disciplinary Board's Findings As The Massachusetts Supreme Judicial Court Did Not Rule On This Question.

There is some difference among the courts as to the standard of evidence needed to support a disciplinary board's findings. Some decisions, notably *Chavis* v. *Rowe*, 643 F.2d at 1287; *Franklin* v. *Israel*, 537 F. Supp. 1112, 1117 n.3 (W.D. Wis. 1982); *Calloway* v. *Fauver*, 544 F. Supp. 584, 605 (D.N.J. 1982); *Nolan* v. *Scafati*, 306 F. Supp. at 3; and *Washington* v. *State*, 405 So. 2d at 64, state that the determination must be reviewed for substantial evidence. Other decisions, notably *Smith* v. *Rabalais*, 659 F.2d at 545; *Inglese* v. *Warden*, 687 F.2d 362, 363 (11th Cir. 1982); and *Finney* v. *Mabry*, 455 F. Supp. at 770, indicate that the court should consider whether the decision is supported by some facts or any evidence at all. In the instant case, however, the Massachusetts Supreme Judicial Court chose not to rule upon whether the "substantial evidence" or the more lenient "some evidence" rule was the more appropriate one. The Supreme Judicial Court concluded that the Board's findings failed to meet even the more lenient "some evidence" test. *Hill*, Cert. Pet. App. A 17, ftn. 5. As the issue of the standard of review was not decided by the Supreme Judicial Court, this case would be an inappropriate vehicle for this Court to use to resolve these conflicts.

The Petitioner also misreads the Court below in postulating that the Supreme Judicial Court has come up with a different standard than the "some evidence" of

Smith v. *Rabalais*, 659 F.2d at 545. The Petitioner argues that by stating that it was reviewing the "legal sufficiency" of the evidence to support the disciplinary board's findings, the Supreme Judicial Court went beyond the standard of "any" evidence to support the board's findings. Pet.'s Br. 11. The Petitioner seems to confuse the reason for review, to find the sufficiency of the evidence, with the standard to be used in determining that sufficiency. The Petitioner also seems to be arguing that the "any evidence" standard means any evidence that might be relevant no matter how tenuous. Under such an interpretation of the "any evidence" standard, an inmate who was present in an institution on the day of a fight might be convicted even if the only evidence presented was his presence in the institution on the day in question. His presence at the institution on the day of the fight is certainly a relevant factor, but is far distant from evidence of guilt. Another example might be an inmate convicted of helping another to violate a regulation based only on the evidence that they knew each other. Again, the fact that they knew each other is relevant but only tenuously related to guilt. An "any evidence" standard would be a charade unless there were some test of the legal sufficiency of that evidence linking it to guilt. A reading of the cases that adopt the "any evidence" standard shows that the legal sufficiency of the evidence must be considered. In *Finney* v. *Mabry*, 455 F. Supp. at 770, the Court specifically states that at some point what is labeled "evidence" cannot serve as a basis for fair fact finding. *Finney, Id.* The Court also refers to "proper evidence." *Finney, Id. Wilwording* indicates it would be "a violation of due process to convict and punish a man without *evidence of his guilt.*" *Wilwording* v. *Swenson*, 502 F.2d at 851 (emphasis added). These cases are indications that the "any evidence" standard of *Smith* v. *Raba-*

lais is the standard used by the Massachusetts Supreme Judicial Court.

Although the issue of "substantial" versus "some" evidence is not before this Court, it is important to note that the Department of Correction's regulations mandate that all disciplinary board decisions be made by a preponderance of the evidence. Code of Mass. Regs. 430.16. These regulations guarantee a decision based on substantial evidence. Violations of state-promulgated regulations violate a person's right to due process. *Kenney* v. *Commissioner of Correction*, 393 Mass. 28 (1984); *Toussaint* v. *Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983); *McKinnon* v. *Patterson*, 425 F.Supp. 383, 393 (S.D.N.Y. 1976). *See also, e.g., Four Unnamed Plaintiffs* v. *Hall*, 424 F. Supp. 357 (D.Mass. 1976); *Walker* v. *Hughes*, 558 F.2d. 1247 (6th Cir. 1977), *Adargo* v. *Barr*, 482 F. Supp. 283 (D.Colo. 1980); *Duckett* v. *Ward*, 458 F. Supp. 624 (S.D.N.Y. 1978); *Bono* v. *Saxbe*, 450 F. Supp. 934 (E.D.Ill. 1978). An individual within the Department of Correction can not arbitrarily disregard agency regulations and Massachusetts courts have acted to enforce the agency's regulations. *Kenney*, 398 Mass. 28. Thus, the decisions of the disciplinary board in this case could have been reviewed to determine if they were based on a preponderance of the evidence. This is, of course, much closer to the "substantial evidence test." However, the *pro se* complaint filed in the Superior Court did not raise the issue of the need for a finding based on the preponderance of the evidence under the regulations.

This Court itself used a substantial evidence test in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957) which is more extensively discussed in Section IV of this brief. In that case, Schware had been denied admission to the New Mexico Bar on the basis of not being

of good moral character. The Court ruled that after reviewing the entire record the evidence on which the state relied would have to raise substantial doubts before it could be considered sufficient to support the denial of admission to the Bar. *Schware*, 353 U.S. at 247.

III. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE BOARD DID NOT RECEIVE SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT AND A DEPRIVATION OF GOOD TIME CREDITS.

Under any standard of review, substantial, preponderant or some evidence, the Supreme Judicial Court and the trial court were both correct in finding that there was insufficient evidence to support the disciplinary board's finding of guilt. Cert. Pet. App. A 16-19, B 8. The total sum of the evidence presented was that after hearing a commotion and seeing an inmate who appeared to have been assaulted, a guard observed three inmates jogging away. The only possible evidence that could have been relied on was that three inmates were seen jogging away from a spot where it appeared that an assault had taken place. The Petitioner seems to be citing the presence of three inmates, "jogging," and statements by two of the inmates that they did not know what had occured as being circumstantial evidence of participation in the assault by those two inmates. A finding of guilt cannot based on such a paucity of facts.

The Supreme Judicial Court has recently indicated that there are inherent dangers in drawing any inference of guilt from flight, *Commonwealth* v. *Toney*, 385 Mass. 575, 583-585, n.6 (1982) and pointed to the equivocal nature of evidence of flight. *Commonwealth* v. *Amado*, 387 Mass. 179 (1982). This is especially true in the instant case in light of the prison setting and the fact that there

were three persons involved in the "flight." Even presuming that one person did commit an assault, the leaving of three persons cannot be said to be evidence that all three participated in the assault. Any prisoner who sees a person who looks like they may have been assaulted, even when he or she has nothing to do with the act, is going to leave so he or she is not found at the place and accused of committing the act. To rely on flight as evidence of consciousness of guilt in this situation leaves an inmate in a peculiar situation. Either he or she remains at the scene of a possible assault and risks being found guilty on the basis of his or her proximity or he or she leaves and is found guilty because the flight is evidence of consciousness of guilt. This dilemma makes it clear why, especially when more than one person is involved, "flight" cannot be considered evidence of guilt.

Nor is it fair to rely on the Respondents' statements that they did not know what happened as evidence of consciousness of guilt. Pet's Br. 21 n.9. They do not deny that something happened, merely that they did not know or see what happened. The sole witness did not see either of the Respondents either before or during the supposed incident and there is no evidence of where the Respondents were actually located during the supposed assault. J.A. 17a-18a, 27a-28a. His report is not evidence that the Respondents must have known what happened but were denying that they knew what happened. Nor is this case similar to *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-320 (1976). There the inmate in question refused to testify at all. An adverse inference could be drawn from that refusal. The Respondents in the instant case did testify. J.A. 19a, 27a. Again, to rely on denial of knowledge in this case as evidence leaves an inmate in a peculiar situation. He can refuse to testify and be found guilty, he can state he

does not know what happened and be found guilty, he can make something up which is not believed and be found guilty or he can confess to something that he did not do and be found guilty.

The instant matter is similar to the situation in *Boyd* v. *Oregon State Penn., Corrections Division*, 29 Or. App. 71 (1977). There the court held that where the record was barren of evidence of where contraband was found in a two-man cell the evidence was insufficient to support a charge of possession of contraband. It is clear that the court felt that where more than one person is implicated in an incident there must be some evidence pointing to a particular inmate before he will be found guilty of what another inmate might have done.

It should also be pointed out that the written statement of evidence cites only the Respondents' presence in the area as support for the finding of guilt. J.A. 19a, 27a. Apparently the board did not rely on the "flight." Although the "jogging away" was mentioned in the reporting officers' report and testimony, the Board only states that this testimony was considered, not that it found it to be true or that the "jogging away" was a fact relied upon for the decision.

It cannot be said that there was "some" evidence to support the Board's finding. "[A]t some point what is labeled 'evidence' cannot serve as a basis for fair factfinding . . ." *Finney* v. *Mabry*, 455 F. Supp. at 770. The consideration of what is evidence which can serve as a basis for fair factfinding is essential to prevent disciplinary hearings from becoming charades that cover a denial of due process.

IV. THE UNITED STATES CONSTITUTION GUARANTEES A RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.

As argued above, the question of whether there is a constitutional right to judicial review of an administrative decision which deprives a person of his or her liberty is not before the Court in the instant case. However, as the issue has been raised by the Petitioner's suggestion that no such right exists, the Respondents feel it appropriate to examine the Court's prior treatment of this question.

The constitutional right to judicial review of administrative decisions which work a deprivation of liberty for the purpose of determining whether the decision is supported by evidence has been recognized at least since *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). In that case, concerning judicial review of an administrative decision to deport a United States resident who claimed to be a citizen, this Court held that "[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." 259 U.S. at 284-285. Considering the scope of judicial review of administrative decisions a decade later, Justice Brandeis said, "[a] citizen who claims that his liberty is being infringed is entitled, upon *habeas corpus*, to the opportunity of judicial determination of the facts." *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring). See *Rusk* v. *Cort*, 369 U.S. 367, 380-382 (1962) (Brennan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974) (statute construed to permit judicial review.)

Even in cases involving property rather than liberty interests, this Court has upheld the right to judicial review of administrative determinations. The setting of

rates charged by a stockyard, for example, was found to be subject to judicial review, despite an effort by the legislature to preclude review of the administrative agency's factual findings.

> When the legislature appoints an agent to act . . . it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily [citations omitted]. . . . In such cases, the judicial inquiry into facts goes no further than to ascertain whether there is evidence to support the findings. . . .
>
> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that their findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and to impair the security inherent in our judicial safeguards."

St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38, 51-52 (1936).

See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 (1975).

Nothing referred to by the petitioner is to the contrary. The lack of a constitutional right to appellate review of a judicial decision says nothing about the right to an initial judicial decision. "The difference in security of judicial over administrative action has been adverted to by this court." *Ng Fung Ho* v. *White*, 259 U.S. at 285. *Reetz* v. *Michigan*, 188 U.S. 507 (1903), is cited by petitioner for

the proposition that "administrative agencies may make final determinations of legal questions, which are not subject to judicial oversight." (Pet's Br. 7). However, this Court explicitly noted in *Reetz* that "it is not true that such proceedings are beyond investigation of the courts." 188 U.S. at 509. In *Dreyer* v. *Illinois*, 187 U.S. 71 (1902) not only was no liberty interest at stake, but this Court did not even consider the question of judicial review.

The petitioner also heavily relies on *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), where welfare recipients, seeking judicial review under state law of agency decisions reducing their benefits, were required to pay a filing fee. The recipients then petitioned the Supreme Court of Oregon to order that the cases be accepted without the payment of filing fees. The Supreme Court of Oregon declined to do so, and from that denial the appeal to this Court was taken. The decision in *Ortwein* does not state that the Oregon courts could not review the Public Welfare Division decisions nor did it state that the Oregon courts could not review those decisions for sufficiency of evidence. It merely stated that because there was no fundamental interest gained or lost depending on the availability of the relief sought, this Court would not mandate that the filing fees be waived. *Id.*, at 659. This Court also specifically distinguished the situation in *Ortwein* where the question was a reduction in benefits, from that of *Broddie* v. *Connecticut*, 401 U.S. 371 (1971) where the question involved was access to the courts in a marital situation. *Id.* Certainly the increased incarceration of a person is a fundamental liberty interest that is much closer to the interests at stake in *Broddie* than to the interest at issue in *Ortwein*.

The Petitioner also cites *Tisi* v. *Todd*, 264 U.S. 131 (1924). *Tisi*, however, only states that a court will not

review the evidence introduced at a deportation hearing to see if it would be legally sufficient to prove a fact in a court of law. The Court, however, did actually review the evidence introduced in the deportation hearing and found that there was evidence which reasonably supported the essential findings in the case. *Id.*, at 133.

Two other cases cited by the Petitioner not only do not support his position but in fact support the Respondents. In *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) this Court held that "[d]eportation without a fair hearing or *on charges unsupported by the evidence* is a denial of due process which may be corrected on *habeas corpus*." *Id.*, at 106 (emphasis added). The standard used was that of some or any evidence. *Id.* (It should be noted that this review was not under an Administrative Procedure Act but that the vehicle for obtaining judicial review was a writ of *habeas corpus*). In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957) this Court went even further in reviewing an administrative decision for the sufficiency of evidence. Schware had been denied admission to the New Mexico Bar on the basis of not being of good moral character. This Court held that "[e]ven in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards . . ." *Id.* at 239. "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." *Id.* This Court then examined the facts on which New Mexico had relied and found them insufficient. *Id.*, at 243. This Court went on to examine the evidence presented by Schware and stated that:

> In light of petitioner's forceful showing of good moral character the evidence upon which the state relies—

> the arrests for offenses for which the petitioner was neither tried or convicted, the use of an assumed name many years ago and membership in the Communist Party during the 1930's—cannot be said to raise *substantial doubts* about his present good moral character."

Id., at 247 (emphasis added). Not only did this court review the administrative decision concerning admission to the bar for the sufficiency of evidence, it required not only that there be some or any evidence to support that decision but also that the evidence be substantial.

The only case that the Petitioner has pointed to in which a court has refused to review the sufficiency of evidence in a prison disciplinary hearing is *Russell* v. *Division of Corrections, Commonwealth of Virginia*, 392 F. Supp. 476 (W.D. Va. 1975), *aff'd without opinion*, 530 F.2d 969 (4th Cir. 1975). The District Court in *Russell* stated that the sufficiency of the evidence in a disciplinary matter was beyond its inquiry and cited *Grundler* v. *North Carolina*, 283 F.2d 798 (4th Cir. 1960). *Grundler*, however, provides no support for this contention. In that case a *habeas corpus* petition was filed in federal court requesting a review of a state criminal trial. The Fourth Circuit ruled that it could not intervene by *habeas corpus*, when the errors were of a character which could not reasonably be said to involve a deprivation of constitutional rights.

> Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented.

Grundler, at 802. As all parties agree that an arbitrary or capricious deprivation of a liberty interest would be a

violation of the due process protections, an allegation that there is no evidence supporting such a deprivation would be precisely the type of situation for which the *Grundler* court reserves the *habeas corpus* petition.

The Petitioner also relies on several military decisions, including *Hiatt* v. *Brown*, 399 U.S. 103 (1950) and *Whelchel* v. *McDonald*, 340 U.S. 122 (1950). These cases do not have a bearing on the instant matter. *Hiatt* and *Whelchel* involve the review of court-martial hearings. The instant case is not analogous to these military cases as the Framers of the Constitution specifically entrusted to Congress the authority and right to determine the rules for the government and regulation of the military. This Constitutional mandate sets the military apart from the civilian courts.

It should also be noted that in military cases there is an extensive formal judicial hierarchy set up with a complete appellate system and provisions for ultimate review by a civilian court. *Burns* v. *Wilson*, 346 U.S. 137, 141, ftn. 7 (1953). This serves the function of the "independent review" referred to by the Supreme Judicial Court, Cert. Pet. App. A 11-12, that is not available in a system of administrative appeals that all take place within the Department of Correction.

In light of the above-cited cases, if this Court were to hold that there is no constitutional right to judicial review of constitutional defects in administrative proceedings which lead to a deprivation of liberty it would be reversing decades of established principle and stepping, totally without need, into a "constitutional quicksand." *Rusk* v. *Cort*, 393 U.S. at 382 (Brennan, J. concurring).

V. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the judgment of the Massachusetts Supreme Judicial Court be affirmed.

Respectfully submitted,

JAMIE ANN SABINO
KLIBANER & SABINO*
402 Washington Street
Wellesley, MA 02181
(617) 237-7602
Counsel of Record

RICHARD B. KLIBANER
KLIBANER & SABINO*
402 Washington Street
Wellesley, MA 02181
(617) 237-7602
On the Brief

APPENDIX

MASS. GEN. LAWS c. 127

§ 129. Record of conduct; reduction of term; determination; certificate of discharge; parole; forfeiture of deductions

The officer in charge of each correctional institution or other place of confinement, except a defective delinquent department, shall keep a record of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under his sentence or sentences, which shall be determined as follows: Upon a sentence of not less than four months and less than one year, two and one half days for each month; upon a sentence of not less than one year and less than two years, five days for each month; upon a sentence of not less than two years and less than three years, seven and one half days for each month; upon a sentence of not less than three years and less than four years, ten days for each month; upon a sentence of four years or more, twelve and one half days for each month; provided, however, that no prisoner serving a sentence imposed for a violation of section thirteen B, twenty-two, twenty-two A, twenty-three, twenty-four or twenty-four B of chapter two hundred and sixty-five or section seventeen, thirty-five or thirty-five A of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said sections shall be entitled to have the term of his imprisonment under such sentence reduced under the provisions of this section. If a prisoner has two or more sentences to be served concurrently or otherwise, the maximum period of time for which he may be held under his sentences shall be the basis upon which the deduction shall be determined; except that when a prisoner on parole is sentenced for a new crime, the sentence on which he was paroled shall be considered separately, and shall not be aggregated with any

new sentence for the purposes of determining the deductions. If a prisoner violates any rule of his place of confinement, the commissioner of correction, the county commissioners, and, in Suffolk county, the penal institutions commissioner of Boston, upon the recommendation and evidence submitted to them respectively, in writing by the principal officer, or officer in charge, shall decide what part, if any, of such good conduct deduction from sentence or sentences shall be forfeited by such violation, and may likewise determine, in the event of the prisoner's subsequent good conduct, whether any or all of such deduction shall be restored.

A prisoner in a correctional institution of the commonwealth who is entitled to have the term of his imprisonment reduced shall receive from the commissioner of correction a certificate of discharge and shall be released from the correctional institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner in a county penal institution who is entitled to have the term of his imprisonment reduced shall receive from the county commissioners or, in Suffolk county, the penal institutions commissioner of Boston, a certificate of discharge, and shall be released from the institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner released on parole by the parole board, who has faithfully observed all the rules of his parole and has not been returned to prison or a county penal institution for the violation of his parole, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under the sentence or sentences, but only for that period of the sentence or sentences during which he was actually confined, and in such case, the parole board shall issue to him a certificate of final discharge and release from further supervision upon the date which has been determined by such a deduction from the maximum term of his sentence or sentences. Any other prisoner released on parole from a county penal institution who

is entitled to have the term of his imprisonment so reduced shall receive from the county commissioners, or in Suffolk county the penal institutions commissioner of Boston, a certificate of final discharge.

If, during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any offense of which he shall be convicted and sentenced, he shall not be entitled to any deductions hereunder from the new sentence or sentences of imprisonment. A prisoner released on parole by the parole board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section until he has served six months following his return to the correctional institution.

MASS. GEN. LAWS c. 249

§ 4. Petition; notice; hearing; determination; limitations; costs; mandamus. A petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the supreme judicial court, and he may, after notice, hear and determine the same. It shall be open to the petitioner to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as matter of law insufficient to warrant such action, finding or conclusion. The writ shall not be issued unless the petition therefor is presented within two years next after the proceedings complained of. It may be issued from the clerk's office in any county and shall be returnable as the court orders. The court at any time after the petition is presented may impose costs upon any party, may issue an injunction and may order the proceedings brought up; and, after they are brought up, may quash or affirm them, or may make such order, judgment or decree as law and justice may require. The powers conferred by the foregoing sentence shall apply also to a petition for a writ of mandamus and to an amended petition for either a writ of certiorari or a writ of mandamus under section one C of chapter two hundred and thirteen, subject in case of appellate proceedings, to the authority of the supreme judicial court to suspend the operation of any judgment or decree and to amend any order pending such appellate proceedings as is provided in equity by section twenty-two of chapter two hundred and fourteen. As amended St.1943, c. 374, § 1; St.1953, c. 586, § 1.

430.08: Detection and Reporting of Disciplinary Offenses

(1) Informal handling of very minor offenses in accordance with existing practices is not precluded or discouraged by these regulations. Where an employee reasonably believes that formal disciplinary action is not necessary he or his supervisor may issue a warning and handle the matter informally as an alternative to formal disciplinary action.

(2) Where informal handling is not appropriate an employee who has reason to believe that a disciplinary offense has been committed by an inmate shall write a disciplinary report and file it with the shift commander or other person designated by the superintendent before the completion of his tour of duty.

(3) Within one (1) weekday the shift commander or other person designated by the superintendant shall review the disciplinary report and either:

(a) Forward it to the disciplinary officer for disciplinary action,

(b) Handle the matter informally in accordance with the provisions of 103 CMR 430.08(1),

(c) Dismiss the disciplinary report.

If he decides to forward the disciplinary report to the disciplinary officer for disciplinary action he may revise or supplement it.

430.09: Preliminary Responsibilities of the Disciplinary Officer

(1) Within two (2) weekdays after receipt of the disciplinary report, the disciplinary officer shall review the disciplinary report, make whatever investigation he deems necessary and either:

(a) Dismiss the disciplinary report.

(b) With the approval of the superintendent take no immediate action on it pending the receipt of further information, or

(c) Proceed with formal disciplinary action.

(2) If the disciplinary officer decides to proceed with formal disciplinary action he shall within the aforesaid two (2) weekdays designate the offense charged as a minor or major matter and he may revise or supplement the disciplinary report. If the charge against the inmate includes the alleged commission of a felony, the disciplinary officer shall immediately notify the superintendent so that he may refer the case to the district attorney for possible prosecution. Any case referred to the district attorney shall be handled as a major matter.

(3) In designating the offense as a minor or major matter the disciplinary officer shall consider the following factors:

(a) Threat to institution security

(b) Repetitiveness

(c) Extent of harm done

(d) Mitigating circumstances

Cases involving little or no threat to the well being of others, to property, or to the security of the institution shall ordinarily be designated as minor matters.

430.10: Proceedings in Minor Matters

(1) After designation of an offense as a minor matter, the disciplinary report shall be served upon the inmate by the disciplinary officer of his designee within one (1) weekday. The disciplinary officer shall then interview the inmate, review the evidence and make a finding of guilty or not guilty within two (2) weekdays after service of the report. Upon a finding of guilty, he shall also impose a sanction or sanctions from the list of minor sanctions at 103 CMR 430.23(1).

(2) The disciplinary officer or his designee shall notify the inmate in writing of the finding and sanction, if any, within one weekday, and, upon a finding of guilty, he shall advise the inmate of his right to appeal to a disciplinary board and shall give the inmate an appropriate appeal form.

(3) An inmate may appeal the findings and/or sanctions of the disciplinary officer on a minor matter to the disciplinary board within two (2) weekdays of the receipt of

the finding. The appeal hearing before the disciplinary board shall be conducted in accordance with the procedures governing hearings before the disciplinary board on major matters except the provisions of 103 CMR 430.12(1) and 430.12(3).

(4) The disciplinary board hearing an appeal on a minor matter may sustain the finding and sanction of the disciplinary officer, reduce or suspend the sanction, or reverse the decision and dismiss the charge.

430.11: Notice and Scheduling of Hearing Before Disciplinary Board

(1) After the designation of the offense as a major matter, the disciplinary report, a notice of the hearing, and a request for representation and/or witness form shall be served upon the inmate by the disciplinary officer or his designee within one weekday.

(2) If an inmate wishes to be represented in accordance with the provisions of 103 CMR 430.12(1) and/or to have the reporting officer or other witnesses present in accordance with the provisions of 103 CMR 430.14(4) and 430.14(6), he shall complete the request for representation and/or witness from and submit it to an officer within twenty-four (24) hours of receiving it. Any officer who receives such form shall complete it and deliver it to the disciplinary officer before the close of his tour of duty.

(3) The disciplinary officer shall schedule a hearing before the disciplinary board within a reasonable time but not less than twenty-four (24) hours after the inmate has been served with both the disciplinary report and the notice specifying the time of hearing. The inmate shall be entitled to one continuance for good cause provided that any request for a continuance must ordinarily be made at least twenty-four (24) hours prior to the scheduled time of the hearing.

430.16: Deliberation and Decision by the Disciplinary Board

(1) After the close of the evidence, the disciplinary board shall meet in executive session to deliberate and determine the guilt or innocence of the inmate. The burden of

proof shall be on the proponent of the disciplinary report and the disciplinary board shall make its findings on the basis of the preponderance of the evidence.

(2) If the inmate is found guilty, the disciplinary board may impose one or more of the sanctions listed in 103 CMR 430.23. The inmate's record shall not be considered by the disciplinary board in determining the guilt or innocence of the inmate but it may be considered by the disciplinary board in deciding the appropriate sanction. The disciplinary board may also in its discretion recall the inmate after reaching a guilty finding but prior to deciding on a sanction to discuss issues related to its decision on a sanction.

430.23: Sanctions

(1) Minor sanctions shall include:

(a) Reprimand.

(b) Loss of privileges for a specified period of time.

(c) Room restrictions.

(d) Restitution.

(e) Extra-work duty for a specified period of time.

(2) Minor sanctions may be suspended for a specified period of time not to exceed 3 months.

(3) Major sanctions shall include:

(a) Isolation for a specified period of time not to exceed 15 days for one offense.

(b) Recommended good time forfeiture.

(c) All minor sanctions.

(4) Major sanctions may be suspended for a specified period of time not to exceed 6 months.

Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS,
CLERK

(1)

NO. 84-438

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

V.

GERALD HILL and
JOSEPH CRAWFORD,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT

REPLY BRIEF OF THE PETITIONER

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240

161

TABLE OF CONTENTS

ARGUMENT.....1

I. THE DECISION OF THE COURT BELOW IS BASED UPON A DETERMINATION THAT THE CONSTITUTION REQUIRES JUDICIAL REVIEW OF THE FACTUAL FINDINGS OF A DISCIPLINARY BOARD.....1

II. THE EXISTENCE OF A DEPARTMENTAL REGULATION ESTABLISHING A STANDARD OF PROOF IN DISCIPLINARY BOARD HEARINGS DOES NOT DICTATE THE SCOPE OF JUDICIAL REVIEW TO BE GIVEN THE FACT FINDINGS OF THE BOARD.....9

CONCLUSION.....11

TABLE OF AUTHORITIES

California v. Mitchell Bros. Santa Ana Theater
454 U.S. 90
(1981) (per curiam).....10

Cepulonis v. Commissioner of Correction
15 Mass. App. Ct. 292 (1983).....6

Delaware v. Prouse
440 U.S. 648 (1979).....9

Hill v. Superintendent
392 Mass. 198, 466
N.E.2d 818 (1984).....8

King v. Higgins
702 F.2d 18 (1st Cir. 1983),
cert. denied, 104 S.Ct.
404 (1983).....11

Michigan v. Long
____ U.S. ____,
103 S.Ct. 3469 (1983).....8

Nelson v. Commissioner of Correction
390 Mass. 379
n.12 (1983).....6

United States v. Caceres
440 U.S. 741 (1979).....11

Vinzant v. King
____ U.S. ____,
104 S.Ct. 404 (1983).....11

Wightman v. Superintendent, M.C.I., Walpole,
19 Mass. App. Ct. 442 (1985).....7

Wolff v. McDonnell
418 U.S. 539 (1974).....8

Woodby v. INS
385 U.S. 276 (1966).....10

Zacchini v. Scripps - Howard Broadcasting Co.,
433 U.S. 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).....9

STATUTES

Massachusetts General Laws
c. 249 §4.....3, 4, 6

NO. 84-438

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

V.

GERALD HILL and
JOSEPH CRAWFORD,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT

REPLY BRIEF OF THE PETITIONER

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS BASED UPON A DETERMINATION THAT THE CONSTITUTION REQUIRES JUDICIAL REVIEW OF THE FACTUAL FINDINGS OF A DISCIPLINARY BOARD.

The question of whether there is a constitutional right to judicial review

of the sufficiency of evidence adduced at prison disciplinary hearings is properly before the court.

Respondents and the Solicitor General assert that the issue was not before the court below and that the decision below is based upon Massachusetts statutory law. (Brief of the Solicitor General, 7; Brief of Respondents, 5-6). Such an assertion is incorrect.

First, in the court below, respondent devoted substantial argument for the assertion that, "The overwhelming weight of opinion is that a person being held in a correctional facility has a constitutional right to review of a disciplinary board's findings for the sufficiency of the evidence." (Brief for the Plaintiff-Appellant, Appeals Court Nos.

83-414, 83-528).[1/] Throughout respondents' brief it was consistently argued that "there is a constitutional right to substantive review by the courts of the decisions of disciplinary hearings." (Brief at 6). Moreover, neither party's briefs ever argued that there was a statutory right to such review provided by G.L. c. 249 §4.

Second, the Supreme Judicial Court characterized the issue presented by the Superintendent's appeal as "(1) the judge erred in reviewing the board's findings for the sufficiency of the evidence because there is no constitutional right to judicial review of a disciplinary board's findings. The

---

1/ A copy of the briefs submitted to the Supreme Judicial Court have been lodged with the Office of the Clerk.

court found: "There is no statutory right of review." (Cert. Pet. App. 4, n.3). The court further concluded that "inmates have a constitutional right to ... review" of the sufficiency of evidence to warrant the findings of a disciplinary board. (Cert. Pet. App. 15).

It is therefore not surprising that the decision is phrased in terms of a constitutional right to "judicial review" for that was the issue before the court. The reference by the court to c. 249 §4[2/] is, it is suggested,

---

2/ As amended in 1973, c. 249 §4 provides:

> A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme

(footnote continued)

merely to advise that the proper procedural vehicle for bringing the issue before the court for review, given that review is constitutionally required, is by way of an action

---

(footnote continued)

> judicial or superior court. Such action shall be commenced within two years next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require. Amended by St. 1963, c. 661, §1, c. 1114, §289.

in the nature of certiorari,[3/] rather than in the form of a complaint entitled "writ of habeas corpus ad testificandum". (Cert. Pet. App. A2, n.2).

Cepulonis v. Commissioner of Correction, 15 Mass. App. Ct. 292 (1983), referred to by respondents at page 6 of their brief, is inapposite. There, the Appeals Court considered, under G.L. c. 249, §4, whether a prison disciplinary board's findings were based on "reliable" evidence, as required by a 1975 state regulation. No issue was

---

3/ The Supreme Judicial Court had not previously resolved the question of whether the validity of an adjudication by a disciplinary board must be challenged by an action in the nature of certiorari. Nelson v. Commissioner of Correction, 390 Mass. 379, 388 n.12 (1983).

raised regarding the constitutional right of a prisoner to judicial review of sufficiency of the evidence before a disciplinary board, although the court did note that a constitutionally-based claim would raise a separate question from that before it. Id. at 295-96. See also, Wightman v. Superintendent, M.C.I., Walpole, 19 Mass. App. Ct. 442 (1985), wherein the Appeals Court, faced with a challenge to disciplinary board findings under state regulations and the State and Federal Constitutions, reached only the regulation-based claim.

Petitioner therefore submits that the issue before the court below was whether the Constitution required judicial review of the findings of fact by a disciplinary board and that the court below held, based upon the Federal Constitution, that judicial review was

required and that this "entitlement logically follow[ed]" from the decision of this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Hill v. Superintendent, 392 Mass. 198, 466 N.E.2d 818 (1984) (Cert. Pet. App. 10). Therefore, petitioner submits that under the principles enunciated in Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469 (1983), this court has jurisdiction to review and decide the issue of a constitutional right to judicial review.

> "Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf solely because of a mere possibility that an adequate and independent ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground. It appears to us that the state court 'felt compelled by what it understood to be federal constitutional to construe

> ... its own law in the manner it did.' Zacchini v. Scripps - Howard Broadcasting Co., 433 U.S. 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977)* (footnote omited) Id. at 3477-3478.

See also, Delaware v. Prouse, 440 U.S. 648, 653 (1979).

II. THE EXISTENCE OF A DEPARTMENTAL REGULATION ESTABLISHING A STANDARD OF PROOF IN DISCIPLINARY BOARD HEARINGS DOES NOT DICTATE THE SCOPE OF JUDICIAL REVIEW TO BE GIVEN THE FACT FINDINGS OF THE BOARD.

Respondents suggest that Department of Correction regulations placing the burden of proof on the proponent of the disciplinary report and directing the board to make its findings on the basis of the preponderance of the evidence dictates the scope of judicial review. (Brief of Respondents, 17). Such an assertion ignores the distinction between the scope of judicial review and

the standard of proof in the initial decision-making tribunal. The difference is "a common-place in the law". Woodby v. INS, 385 U.S. 276, 282 (1966). The evidentiary standard imposed by state regulations in no way dictates the constitutional standard applicable on judicial review. Id. Moreover, while state regulations may require a certain degree of proof in the fact-finding tribunal, that may be a matter of state law and not a constitutionally required standard. See, California v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam).

Contrary to respondents' contention (See, Brief of Respondents, p. 19), violation of the state's regulations would not, in and of itself, constitute a violation of the due process clause.

See, United States v. Caceres, 440 U.S. 741, 752 (1979); King v. Higgins, 702 F.2d 18, 20 (1st Cir.), cert. denied sub nom.; Vinzant v. King, ____ U.S. ____, 104 S.Ct. 404 (1983).

CONCLUSION

For the reasons stated in his brief and in this reply brief, petitioner respectfully requests this Court to reverse the judgment of the Court below.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A.H. Smith

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240